officer, voted to consider the items listed for the closed meeting in closed session.

The subject matter of the closed meeting scheduled for Wednesday, May 31, 1989, at 2:30 p.m., will be:

Institution of administrative proceedings of an enforcement nature.
Settlement of administrative proceedings of an enforcement nature.
Settlement of injunctive actions.
Institution of injunction actions.

At times changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: Patrick Daugherty at (202) 272–2200.

Jonathan G. Katz,

Secretary.

May 25, 1989.

[FR Doc. 89–13004 Filed 5–26–89; 11:48 am]
BILLING CODE 8010-01-M

Corrections

Federal Register
Vol. 54, No. 103
Wednesday, May 31, 1989

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

ADMINISTRATIVE COMMITTEE OF THE FEDERAL REGISTER

1 CFR Parts 17 and 21

Updates and Changes to Publication Procedures

Correction

In rule document 89-5228 beginning on page 9670 in the issue of Tuesday, March 7, 1989, make the following corrections:

§ 17.7 [Corrected]

1. On page 9680, in the second column, the amendatory language in Item 10 should read, "Newly designated § 17.7 is amended by revising the section heading, redesignating the introductory text and paragraphs (a) and (b) as paragraphs (a) and (a)(1) and (a)(2) respectively, removing the word 'tabulations' from newly designated paragraph (a)(1) and adding the words 'or lengthy tables' in its place, and by adding a new paragraph (b) to read as follows:".

2. On page 9680, in the third column, in the sixth line from the top, paragraph (c) of § 17.7 is correctly designated as paragraph (b).

§ 21.11 [Corrected]

3. On page 9682 in the second column, in Item 7, paragraphs (a) and (a)(1) through (a)(8) of § 21.11 are correctly designated as introductory text and paragraphs (a) through (h) respectively.

BILLING CODE 1505-01-D

POSTAL RATE COMMISSION

39 CFR Part 3001

[Docket No.RM89-3]

Rules of Practice and Procedure Relating to Documentation of Statistical and Volume Evidence

Correction

In proposed rule document 89-12279 beginning on page 22317 in the issue of Tuesday, May 23, 1989, make the following correction:

On page 22318, in the first column, under **DATE**, "May 13, 1989" should read "June 13, 1989".

BILLING CODE 1505-01-D

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

[Notice No.89-10]

Rotationally Molded Plastic Portable Tanks; Portable Tanks Manufactured Under DOT-E 9340; Potential Safety Problems

Correction

In notice document 89-10836 beginning on page 19481 in the issue of Friday, May 5, 1989, make the following correction:

On page 19481, in the 3rd column, under **SUPPLEMENTARY INFORMATION**, in the 2nd paragraph, in the 18th and 19th lines, "lead" should read "leak".

BILLING CODE 1505-01-D

federal register

Wednesday
May 31, 1989

Part II

Department of Commerce

International Trade Administration

19 CFR Part 355

Countervailing Duties; Notice of Proposed Rulemaking and Request for Public Comments

DEPARTMENT OF COMMERCE

International Trade Administration

19 CFR Part 355

[Docket No. 90390-9090]

Countervailing Duties

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Notice of proposed rulemaking and request for public comments.

SUMMARY: The International Trade Administration proposes to establish regulations codifying the methodology used to determine the existence and value of countervailable subsidies. The regulations are intended to improve the administration of the countervailing duty provisions of the Tariff Act of 1930, as amended.

DATE: Written comments will be considered if received not later than [insert date 60 days after date of publication in **Federal Register**].

ADDRESS: Address written comments (10 copies) to Eric I. Garfinkel, Assistant Secretary for Import Administration, Room B-099, U.S. Department of Commerce, Pennsylvania Avenue and 14th Street, NW., Washington, DC 20230. Comments should be addressed: Attention: Notice of Proposed Rulemaking/Amendments to Countervailing Duty Regulations. Each person submitting a comment should include his or her name and address, and give reasons for any recommendation.

FOR FURTHER INFORMATION CONTACT: William D. Hunter, Deputy Chief Counsel for Import Administration, Office of the Chief Counsel for Import Administration, (202) 377-1411.

SUPPLEMENTARY INFORMATION:

Classification

Executive Order 12291. The International Trade Administration ("ITA") has determined that the proposed regulations codifying the methodology used to determine the existence and value of countervailable subsidies under 19 Code of Federal Regulations ("CFR") Part 355 are not a major rule as defined in section (1)(b) of Executive Order 12291 (46 FR 13191, February 19, 1981) because they will not: (1) Have a major monetary effect on the economy; (2) result in a major increase in costs or prices; or (3) have a significant adverse effect on competition (domestic or foreign), employment, investment, productivity, or innovation.

Executive Order 12612. These proposed regulations do not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612 (52 FR 41685, October 30, 1987).

Paperwork Reduction Act. These proposed regulations will not impose a collection of information requirement for purposes of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

Regulatory Flexibility Act. The General Counsel of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that the proposed regulations will not have a significant economic impact on a substantial number of small business entities because, to the extent it changes existing practices, the rule simply improves the administration of the countervailing duty provisions of the Tariff Act of 1930, as amended. As a result, a Regulatory Flexibility Analysis was not prepared.

Background

The current countervailing duty regulations in Subparts A, B, and C of 19 CFR Part 355 (53 FR 52306; December 27, 1988) are based on Subtitles A, C, and D of Title I of the Trade Agreements Act of 1979 (Pub. L. 96-39; July 26, 1979) ("Trade Agreements Act"), which amended section 303 and Title VII of the Tariff Act of 1930 (19 U.S.C. 1303, and Subtitle IV, Parts I, III and IV) ("Tariff Act"). Title VI of the Trade and Tariff Act of 1984 (Pub. L. 98-573; October 30, 1984) ("1984 Act") and Part 2, Subtitle C, Title I of the Omnibus Trade and Competitiveness Act of 1988 (Pub. L. 100-418; August 23, 1988) ("1988 Act") further amended the countervailing duty provisions of the Tariff Act. The current regulations relating to subsidies on quota cheese in Subpart D of 19 CFR Part 355 are based on section 702 of the Trade Agreements Act (19 U.S.C. 1202 note).

These regulations codify much of the Department's existing practice with respect to the identification and measurement of subsidies under the countervailing duty ("CVD") law. We are promulgating regulations at this time for several reasons.

First, it long has been the Department's intent to promulgate methodological regulations once the Department had gained sufficient experience with the administration of the CVD law. See "Notice of Final Rules and Request for Comments," 45 FR 4932 (1980). Having administered the law for nine years, we now feel confident in codifying certain administrative practices in the form of regulations.

Second, we believe that a codification of administrative practice at this time will streamline proceedings for both parties to CVD proceedings and Department officials. Although Department administrative precedents are published, the number of precedents has grown to such an extent that the body of case law has become unwieldy. In addition, while the writings of current and former Department officials provide useful summaries of the Department's CVD methodology, these writings are unofficial and parties cannot rely upon them with certainty.

Third, in two recent decisions, the U.S. Court of International Trade ("CIT") has criticized the Department for relying upon the methodological appendix attached to the final determination on *Cold-Rolled Carbon Steel Flat-Rolled Products from Argentina,* 49 FR 18016 (1984) (hereinafter referred to as "Subsidies Appendix") without first engaging in rulemaking pursuant to the Administrative Procedure Act. *Ipsco, Inc.* v. *United States,* 687 F. Supp. 614 (1988); and *Saudi Iron and Steel Co. (Hadeed)* v. *United States,* 686 F. Supp. 914 (1988). According to the CIT, because the Department allegedly was treating the practices in question as if they were rules, within the meaning of the Administrative Procedure Act, the Department either had to undertake rulemaking procedures or justify its use of these methodologies on a case-by-case basis. Although we do not necessarily agree with the CIT's conclusion that rulemaking is required, *see SEC* v. *Chenery,* 332 U.S. 194 (1947); *see also generally* Weaver, *Chenery II: A Forty-Year Perspective,* 40 Admin. L. Rev. 161 (1988), assuming, *arguendo,* that those decisions are correct, it remains difficult to predict exactly which aspects of the Department's methodology require rulemaking and which do not. Therefore, the issuance of regulations will restore the certainty and predictability to the administration of the CVD law which may have been undermined by *Ipsco* and *Hadeed.*

These proposed regulations are not limited to those matters contained in the Subsidies Appendix, which dealt largely with the valuation of subsidies. These regulations attempt to codify the Department's practice with respect to both the identification and measurement of those types of foreign government programs most frequently encountered by the Department. Changes from existing practice are noted, where applicable.

Conceptually, the regulations are based upon the economic model articulated by the Department in its final determinations in *Carbon Steel Wire Rod from Czechoslovakia* and *Carbon Steel Wire Rod from Poland, see, e.g.*, 49 FR 19375 (1984), and sustained by the court in *Georgetown Steel Corp.* v. *United States*, 801 F.2d 1308 (Fed. Cir. 1986). This model, which generally defines a subsidy as a distortion of the market process for allocating an economy's resources, underlies the Department's entire CVD methodology.

Structurally, these proposed regulations are organized as follows. Except where otherwise noted, these regulations appear as subpart D to Part 355 of title 19 of the Code of Federal Regulations. Current subpart D (quota cheese) is redesignated as subpart E.

Section 355.41 contains a list of definitions. To the extent possible, we have attempted to rely on the definitions contained in § 355.2 of the current regulations. However, where this was not possible, we have created new definitions for purposes of subpart D.

Section 355.42 contains a basic, two-element definition of a countervailable subsidy. Sections 355.43 and 355.44 elaborate on each of these elements.

Section 355.45 codifies certain aspects of the Department's practice with respect to upstream subsidies. Section 355.46 deals with offsets to gross benefits. Section 355.47 deals with the assignment of a benefit to a particular product or market, a topic generally referred to within the Department under the rubric of "tying." Section 355.48 codifies existing practice concerning the timing of receipt of benefits. Section 355.49 deals with the assignment of benefits to a particular year or years. Section 355.50 codifies Department practice with respect to program-wide changes. Finally, § 355.51 codifies existing practice concerning the calculation of country-wide subsidy rates.

The regulations incorporated in this proposed rule are described in the following section-by-section analysis.

1. *Section 355.41.* Section 355.41 contains a list of definitions of terms used in subpart D. The definitions are largely self-explanatory, but a few warrant comment.

The term "government" in paragraph (b) includes an entity controlled by a government. Thus, for example, the sale of a good by a government-owned corporation could constitute the provision of a good by a government for purposes of § 355.44(f).

Section 355.41 does not define industry, which in subpart D is used largely in the context of the specificity test set forth in § 355.43(b). However, § 355.2(h) of the current regulations contains a definition of "industry" which is inappropriate in the context of subpart D. Therefore, we are amending § 355.2(h) so as to render that provision inapplicable to subpart D.

We also are amending § 355.2 of the current regulations by adding a new paragraph (r) which defines the term "program." Although the word "program" is used throughout the current regulations, and is used extensively in the new subpart D of these proposed rules, it currently is undefined. Paragraph (r) defines "program" as any act or practice of a foreign government. It must be emphasized, however, that the use of this term is for purposes of convenience; it is not intended to limit the universe of countervailable subsidies to certain routinized actions of a foreign government. Thus, for example, equity infusions in a firm by a government, which tend to be isolated acts, would be regarded as a program for purposes of the regulations.

2. *Section 355.42.* This section defines the two elements which are necessary in order to find a subsidy which is actionable (*i.e.*, countervailable) under the Act: (a) Selective treatment; and (b) a countervailable benefit. In the numerous decisions under the Act by the Department and the courts since 1980, these two elements have emerged as the prerequisites for a countervailable subsidy. Sections 355.43 and 355.44 of these proposed regulations elaborate on each of these elements.

The necessity for each of these elements can be demonstrated by a few simple hypothetical situations. For example, the nonexcessive rebate upon exportation by a foreign government of final stage indirect taxes provides selective treatment in that the rebate is limited to exporters. However, there is no countervailable benefit (and, thus, no countervailable subsidy), because the nonexcessive rebate of final stage indirect taxes is permissible under domestic law and international rules. See, *e.g.*, *Zenith Radio Corp.* v. *United States*, 437 U.S. 443 (1978); and item (g) of the Illustrative List of Export Subsidies annexed to the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, *opened for signature* Apr. 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619, *reprinted in Agreements Reached in the Tokyo Round of Multilateral Trade Negotiations*, H.R. Doc. No. 153, 96th Cong., 1st Sess. (pt. 1) 257 (1979) ("the Subsidies Code"). Conversely, a foreign government may introduce a tax credit to encourage new investment. The credit is claimed by a variety of firms, but cannot be used by those firms not purchasing new plant and equipment. All the firms that use the tax credit clearly receive a benefit in the form of a tax savings. However, there is no selective treatment (and, thus, no countervailable subsidy), because the tax credit is not targeted to specific firms or industries within the economy.

Paragraph (b) of § 355.42 also requires that the countervailable benefit must be provided with respect to the merchandise. Pursuant to § 355.2(k) of the current regulations, "the merchandise" means the class or kind of merchandise subject to the CVD proceeding. The purpose of this requirement is to make clear that under the Department's principles concerning "tying," which are set forth in section 355.47 of these proposed rules, no countervailable subsidy exists if benefits are tied to products other than the merchandise.

We have used the somewhat redundant term "countervailable subsidy" deliberately in order to make clear the distinction between an actionable subsidy under the Act and what a layperson might regard as a subsidy.

3. *Section 355.43.* This section sets forth the criteria for determining the existence of selective treatment under § 355.42(a) of these proposed rules. Paragraph (a) establishes criteria for determining when a program is considered to be an "export" program. Paragraph (b) then sets forth the criteria for determining when a "domestic" program is "specific" within the meaning of the Act.

The export/domestic distinction can have an important impact on the manner in which a program is analyzed and any benefit valued. For example, pursuant to § 355.44 of these proposed rules, the standards for determining whether a countervailable benefit exists may differ depending upon whether the benefit is provided pursuant to an export or a domestic program.

In addition, the denominator used to calculate an *ad valorem* subsidy rate pursuant to § 355.47 will differ depending upon whether the program in question is an export or a domestic program. Also, only export programs can trigger a finding of critical circumstances pursuant to section 703(e) of the Act and 19 CFR 355.16(a)(1), and under the antidumping law, adjustments to United States price pursuant to section 772(d)(1)(D) of the Act are made for export, but not domestic, subsidies.

Paragraph (a)(1) of § 355.43 restates the standard used by the Department over the years to distinguish export from domestic programs. See, *e.g., Heavy Iron Construction Castings from Brazil*, 51 FR 9491 (1986). The essential aspect of an export program is that a government provides special benefits to exports or exporters above and beyond what it may provide to nonexported products or nonexporters.

Paragraph (a)(2) codifies existing practice with respect to programs with multiple eligibility criteria. Frequently, for example, a government may make "impact on export earnings" a criterion to be evaluated by government officials in determining whether to provide benefits under a program or the amount of benefits to be provided. In such situations, the Secretary must evaluate all of the facts in order to determine whether the program operates in such a way as to render it an export, as opposed to a domestic, program with respect to the merchandise. See, *e.g., Certain Carbon Steel Products from Austria*, 50 FR 33369 (1985).

Paragraph (b)(1) of § 355.43 codifies the specificity test, the statutory test consistently used by the Department to determine whether selective treatment exists with respect to a domestic program. Under this test, the Department deems a program to be specific if the program is limited, either *de jure* or *de facto*, to a specific enterprise or industry, or group of enterprises or industries.

Paragraph (b)(2) sets forth the general factors the Department will consider in applying the specificity test. As the Department has explained in various determinations over the years, the specificity test cannot be reduced to a precise mathematical formula. Instead, the Department must exercise judgment and balance various factors in analyzing the facts of a particular case. Paragraph (b)(2) lists, in a noninclusive manner, the factors that the Department typically will examine in determining whether a domestic program is, either on a *de jure* or *de facto* basis, specific.

Under paragraph (b)(3), the Department will deem a program to be specific if it is limited to firms or industries located in specific regions of a country.

Paragraph (b)(4) codifies the Department's existing practice for determining when the provision by a foreign government of infrastructure is considered to be specific. This test was first fully articulated in *Carbon Steel Wire Rod from Saudi Arabia*, 51 FR 4206 (1986), and has been followed in a number of subsequent cases. See, *e.g., Industrial Phosphoric Acid from Israel*, 52 FR 25447 (1987); *Rice from Thailand*, 51 FR 12356 (1986); and *Fresh Atlantic Groundfish from Canada*, 51 FR 10041 (1986). In this regard, the Department does not agree with the suggestion made in *Cabot Corp.* v. *United States*, 620 F. Supp. 722 (Ct. Int'l Trade 1985), *appeal dismissed*, 788 F.2d 1539 (Fed. Cir. 1986), *order vacated*, (Ct. Int'l Trade, Nov. 20, 1986), that the provision by a foreign government of infrastructure never can constitute a countervailable subsidy

Paragraph (b)(4) restates the three-pronged test currently used by the Department. Where limitations on use do not result from government action, but instead result from the location and type of the infrastructure in question, specificity may not exist. As with the specificity test in general, the Department must apply the test set forth in paragraph (b)(4) on a case-by-case basis in determining whether the provision of particular infrastructure is specific.

Paragraph (b)(5) codifies the Department's practice concerning the specificity test with respect to domestic programs of governments other than national governments of foreign countries. In such instances, the determination of specificity depends upon the *de jure* and *de facto* availability of a program within the jurisdiction of the state, provincial, or local government in question. See, *e.g., Iron Ore Pellets from Brazil*, 51 FR 21961 (1986); and *Live Swine and Fresh, Chilled and Frozen Pork Products from Canada*, 50 FR 25097 (1985). It should be noted that although they are rare, export programs can exist at the state, provincial, or local government level. See, *e.g., Certain Granite Products from Spain*, 53 FR 24340 (1988).

In this regard, these proposed rules are not intended to change existing practice with respect to programs funded by both the Federal and the State, provincial, or local government. In such instances, the Department would judge the specificity of the federally funded portion of the program based upon the availability and use of the program throughout the country in question as a whole. The Department would judge the specificity of the portion funded by the State, provincial, or local government based upon the availability and use of the program within the jurisdiction of the relevant local government unit. See, *e.g., Fresh Atlantic Groundfish from Canada*. 51 FR 10041 (1986), and *Oil Country Tubular Goods from Canada*. 51 FR 15037 (1986), and the discussions of GDA and ERDA agreements therein.

In some cases, respondents have argued that in determining the specificity of a program ostensibly limited to a specific industry, the Department should consider the existence of comparable programs providing similar benefits to other industries. The Department's position has been to reject such an analysis unless it finds that the programs are integrally linked to one another. See, *e.g., Fresh Atlantic Groundfish from Canada*, 50 FR 10041 (1986); and *Fresh Cut Flowers from the Netherlands*, 52 FR 3301 (1987). Paragraph (b)(6) codifies this position.

Paragraph (b)(7) codifies existing Department practice with respect to programs limited solely to firms of a certain size. Under that practice, the fact that a program is limited to all small businesses, for example, does not necessarily result in a finding of specificity. See, *e.g., Textile Mill Products and Apparel from Singapore*. 50 FR 9840 (1985). However, a small business program may be deemed specific if, either on a *de jure* or *de facto* basis, benefits under the program are limited to certain small businesses. *Cf., Iron-Metal Construction Castings from Mexico*, 50 FR 43262 (1985).

Paragraph (b)(8) codifies existing Department practice with respect to agricultural programs. Under that practice, a program that is limited to the agricultural sector does not necessarily result in a finding of specificity. See, *e.g., Fuel Ethanol from Brazil*, 51 FR 3361 (1986); and *Live Swine and Fresh, Chilled and Frozen Pork Products from Canada*, 50 FR 25097 (1985). However, an agricultural program may be deemed specific if, for example, benefits under the program are limited to, or provided disproportionately to, producers of particular agricultural products. See, *e.g., id.*

4. *Section 355.44*. Section 355.44 sets forth the standards for determining the existence of a countervailable benefit with respect to particular types of foreign government programs. As in the case of the Act itself, § 355.44 does not constitute an all-inclusive list of programs capable of providing a countervailable benefit. Instead, this section identifies the types of programs most frequently encountered by the Department and the standards used with respect to each. The Department would deal with programs not included in this section in accordance with the basic principles embodied in the Act, these regulations, and administrative and judicial precedents.

Paragraph (a). Paragraph (a) of § 355.44 codifies the Department's practice of treating the entire amount of a grant as a countervailable benefit. We

note here that although the Department treats the entire amount of a grant as a countervailable benefit, the allocation and valuation of a grant depends upon the application of the rules set forth in § 355.49 of these proposed regulations.

Paragraph (b). Paragraph (b) sets forth the standards for determining whether a loan provided by a government confers a countervailable benefit. Paragraph (b), which deals primarily with the selection of the appropriate benchmark interest rate, generally restates existing Department practice as set forth in the Subsidies Appendix and numerous other Department precedents. See, *e.g.*, Subsidies Appendix at 18018–20.

Paragraph (b)(1) sets forth the general rule for all types of loans provided by a government; namely, that in determining the existence of a countervailable benefit, the Department will compare what a firm pays for a government loan against what the firm would have paid for a benchmark loan. Subsidies Appendix at 18018.

Paragraph (b)(2) restates existing Department practice with respect to the deferral of principal repayments and interest payments on loans provided by a government. See, *e.g.*, Subsidies Appendix at 18019. Essentially, unless a deferral is a normal or customary lending practice in the country in question, the Secretary will regard the deferral of principal or interest repayments on a government loan as conferring a countervailable benefit, in addition to any benefit conferred by an interest rate below the benchmark interest rate, to the extent that the deferral results in a total loan repayment that is less than the repayment that would have occurred under the benchmark loan.

Paragraph (b)(3) describes the selection of a benchmark interest rate with respect to short-term government loans. The first sentence of paragraph (b)(3)(i) restates the existing practice of using as a benchmark the average interest rate for the predominant alternative source of short-term financing in the country in question. See, *e.g.*, Subsidies Appendix at 18020; and *Alhambra Foundry* v. *United States*, 626 F. Supp. 402 (Ct. Int'l Trade 1985). The rationale for using a "country-wide" benchmark was stated in the Subsidies Appendix as follows:

> We believe the distinction between our treatment of short-term and long-term loans is valid. Lending short-term generally is not as risky as long-term, because of the shorter duration of the repayment obligation and the greater frequency of accompanying security (for example, accounts receivable). Because there is little need for the lender to vary its terms to account for varying risk characteristics among companies, we would not expect company-specific short-term loan terms to vary from national average terms. Additionally, because of the enormous number of short-term loans involved in many cases, the use of company-specific benchmarks would significantly impair our ability to administer the countervailing duty law within the short time limits established by the Act.

Subsidies Appendix at 18020; *see also Ceramic Tile from Mexico*, 53 FR 15290 (1988).

The Department is aware of contrary arguments in favor of using short-term benchmarks based upon the borrowing experience of individual firms. Before issuing final rules, the Department will reevaluate its current practice in order to determine whether to provide for the use of company-specific short-term benchmarks.

The second sentence of paragraph (b)(3)(i) clarifies that in selecting an average benchmark interest rate, the Secretary will attempt to use a single, predominant source of short-term financing in the country in question. The Department did not articulate this principle clearly in the Subsidies Appendix, but has applied it in subsequent cases. See, *e.g.*, *Roses and Other Cut Flowers from Colombia*, 51 FR 44931 (1986); and *Carbon Steel Wire Rod from Malaysia*, 53 FR 13303 (1988). The rationale for this approach is that, first, the purpose of the comparison is to determine what a firm's cost of money would be absent the allegedly countervailable government loan. Where there is a predominant source of financing, this source provides the most likely indication of what the firm's alternative costs would be. Second, the use of a single source provides administrative savings to the Department and greater predictability to the parties involved in a CVD proceeding.

Occasionally, there will not be a single, predominant source of short-term financing in a country. Therefore, the third sentence of paragraph (b)(3)(i) provides that in such instances the Secretary may construct a composite benchmark interest rate from two or more alternative sources of short-term financing. See, *e.g.*, *Non-Rubber Footwear from Argentina*, 51 FR 28613 (1986); *Certain Textile Mill Products and Apparel from Colombia*, 52 FR 13272 (1987). The rationale for this approach is that where there is no single, predominant source of short-term financing, a firm would meet its short-term debt needs by borrowing from one or more of these alternative sources. Thus, the best alternative measure of what a firm's cost for short-term debt would be absent the allegedly subsidized government loan is an average of what the costs would be if the firm used the alternative sources.

Paragraph (b)(3)(ii) clarifies what the Department considers to be a "predominant" source of short-term financing. Under paragraph (b)(3)(ii), a source of financing is predominant if it is greater than or equal to 50 percent of the total short-term financing, in local currency, in the relevant country.

Paragraph (b)(3)(iii) codifies the period for which the Department will calculate a short-term loan benchmark. Unless short-term interest rates have fluctuated significantly during the year in question, the Department will calculate a single, annual average benchmark interest rate.

Paragraph (b)(4) sets forth, in order of preference, the benchmarks used with respect to long-term, fixed-rate government loans. Paragraph (b)(5) sets forth a comparable list of benchmarks used with respect to long-term, variable-rate government loans. As under existing practice, paragraphs (b) (4) and (5) contain a preference for company-specific benchmarks, because such benchmarks enable the Department "to capture the fact that certain companies are more (or less) risky than average, and that commercial lenders will take these risk characteristics into account in setting the conditions of the loan." Subsidies Appendix at 18018–19. However, because company-specific benchmarks are not always available, paragraphs (b) (4) and (5) include a list of alternative benchmarks: national average long-term benchmarks or a short-term benchmark. In the past, where company-specific long-term benchmarks have not been available, the Department has attempted to use long-term financing received by a different firm in the same industry before going to a national average benchmark. The Department has found that any additional accuracy gained through the use of an "industry" benchmark is outweighed by the administrative burden involved in identifying such benchmarks. Therefore, paragraphs (b)(4) and (b)(5) do not provide for the use of industry benchmarks.

Paragraph (b)(6) restates existing Department practice with respect to loans to uncreditworthy firms. In the case of uncreditworthy firms, the Department assumes that a private lender would require a premium interest rate, and the rule set forth in paragraph (b)(6) is designed to take this into account. Thus, the Department

calculates a different benchmark for long-term loans to uncreditworthy firms.

Paragraph (b)(6)(i) describes the standard for determining whether a firm is uncreditworthy. Because these determinations are "often highly complex," Subsidies Appendix at 18019, paragraph (b)(6)(i) does not set forth a hard-and-fast rule, but merely describes certain factors that the Secretary may examine in determining the creditworthiness of a firm. It must be emphasized that this list of factors is not intended to be an exhaustive list. As under existing practice, the existence of private long-term loans, provided without an explicit government guarantee, normally would be a dispositive indicator that a firm was creditworthy.

Paragraph (b)(6)(ii) codifies current Department practice to the effect that the Department normally will not investigate the creditworthiness of a firm absent a specific allegation by petitioner, supported by documentation that demonstrates that the firm is uncreditworthy. See, *e.g., Fuel Ethanol from Brazil*, 51 FR 3361 (1986). The reason for this requirement is that the investigation and analysis of creditworthiness adds substantially to the work involved in a CVD investigation or review. Therefore, prior to incurring this burden, it is reasonable to require a petitioner to provide particular evidence establishing a reasonable basis to believe or suspect that the firm in question is uncreditworthy. Generally, where the Secretary previously has found a firm to be uncreditworthy and there has been no intervening finding of creditworthiness, the prior finding shall constitute a reasonable basis to believe or suspect that the firm continues to be uncreditworthy.

Paragraph (b)(6)(iii) codifies existing Department practice with respect to the effect of subsidies on the creditworthiness of a firm. In the past, it has been argued that in assessing creditworthiness the Department should subtract subsidies received by a firm from the firm's financial data. In the Department's opinion, this approach results in the use of a standard different from that used by a private lender, who will look to the financial position of the firm at the time of the loan. In addition, this approach takes into account the secondary effects of subsidies, a highly speculative exercise which the Department has avoided in other contexts and which is not required by the statute. See Subsidies Appendix at 18023. Therefore, paragraph (b)(6)(iii) provides that the Secretary will ignore subsidies in making creditworthiness determinations.

Paragraph (b)(6)(iv) describes the benchmark the Secretary will use in the case of a government long-term loan to a firm deemed to be uncreditworthy under paragraph (b)(6)(i). Paragraph (b)(6)(iv) codifies the current "risk premium" used by the Department with respect to such loans. See Subsidies Appendix at 18019–20.

Paragraph (b)(6)(v) codifies existing practice concerning government short-term financing to uncreditworthy firms. Under the regulation, the creditworthiness of a firm would be irrelevant with respect to short-term financing "[b]ecause of the low level or risk associated with short-term debt, and the frequent existence of security." Subsidies Appendix at 18020.

Paragraph (b)(7) restates the current principle that in selecting a benchmark for comparison purposes, the Secretary will attempt to use, where possible, a nongovernment source of financing. However, where necessary, the Secretary may use financing made available under one or more government programs, provided that any such government program is not deemed to be selective within the meaning of section 355.43; *e.g.*, the government program is not limited to exporters or to a specific industry. See, *e.g., Certain Apparel from Argentina*, 52 FR 26053 (1987); *Certain Textile Mill Products and Apparel from Colombia*, 52 FR 13272 (1987); and *Fuel Ethanol from Brazil*, 51 FR 3361 (1986). This principle recognizes that in some countries with less developed financial markets, the government may take a more active role in making funds available to the economy. In such instances, it is appropriate to use as a benchmark financing provided or directed by the government, so long as such financing itself does not constitute a countervailable subsidy.

Paragraph (b)(8) restates the existing preference for comparing two effective interest rates where the Secretary can quantify any charges added on to nominal interest rates. See, *e.g., Bricks from Mexico*, 53 FR 15264 (1988); and *Oil Country Tubular Goods from Argentina*, 51 FR 41649 (1986). A comparison of effective interest rates provides the most accurate measure of the existence and extent of any countervailable benefit conferred by means of government financing. However, consistent with existing practice, paragraph (b)(8) also provides that where the Secretary cannot quantify any charges added on to nominal interest rates, either with respect to the government financing or the benchmark financing, the Secretary will compare nominal interest rates. See, *e.g., Certain Apparel from Argentina*, 52 FR 26053 (1987); and *Iron-Metal Castings from India*, 51 FR 45789 (1986). It would be less accurate to compare a nominal interest rate with an effective interest rate. Therefore, paragraph (b)(8) provides that the Secretary will make such a comparison only as a last resort; *e.g.*, where there is no information permitting an effective-to-effective or nominal-to-nominal comparison. Of course, although not expressly stated in paragraph (b)(8), in some situations the nominal interest rate may be the same as the effective interest rate. See, *e.g., Castor Oil Products from Brazil*, 52 FR 18726 (1987); and *Fabricated Automotive Glass from Mexico*, 50 FR 1906 (1985).

Paragraph (b)(9) clarifies the standard for investigating the lending activity of government-owned banks. In some countries, banks may be owned, in whole or in part, by the government. Despite government ownership, however, the banks function as commercial enterprises. In such instances, it is not warranted or feasible for the Department to routinely investigate all loans provided by government-owned banks. Therefore, paragraph (b)(9) provides that government ownership alone shall not be sufficient to trigger an investigation of a bank's lending activity, and that there must be some allegation that (i) a bank provided a loan at the direction of the government or with funds provided by the government, and (ii) the loan was provided on terms inconsistent with commercial considerations. See, *e.g., Granite Products from Italy*, 53 FR 27197 (1988).

Paragraph (c). Paragraph (c) clarifies the standard for determining when a government guarantee of a loan constitutes a countervailable benefit. Pursuant to paragraph (c)(1), an explicit guarantee by a government of a loan constitutes a countervailable benefit to the extent that: (i) The price or fee paid by a firm to a government for the guarantee is less than the price the firm would have paid for a comparable commercial loan guarantee (*see, e.g., Fresh Cut Flowers from the Netherlands*, 52 FR 3301 (1987) and *Live Swine from Canada*, 50 FR 25097 (1985)); or (ii) the amount paid by the firm for the guaranteed loan is less than what it would have paid for a benchmark loan (*cf., Certain Carbon Steel Products from Brazil*, 49 FR 17988 (1984); and Subsidies Appendix at 18019). As under current practice, the Department would not regard a so-called "implicit" loan guarantee by a government as giving

rise to a countervailable benefit. See, *e.g., Certain Carbon Steel Products from Austria*, 50 FR 33369 (1985).

Paragraph (c)(2) codifies current practice by providing that where a government is a principal owner or shareholder of a firm, the Department will not regard an explicit loan guarantee by the government as a countervailable benefit if it is the normal commercial practice in the country in question for owners or shareholders to provide comparable loan guarantees for their firms. See, *e.g., Certain Carbon Steel Products from Venezuela*, 50 FR 11227 (1985); and *Carbon Steel Wire Rod from Trinidad and Tobago*, 49 FR 480 (1984).

Paragraph (d). Paragraph (d) sets forth the Department's standard for determining whether a government export insurance program provides a countervailable benefit. Paragraph (d)(1) defines the general rule as reflected by existing Department practice: that premium rates charged must not be manifestly inadequate to cover operating expenses and losses. See, *e.g., Fresh Cut Flowers from Israel*, 52 FR 3316 (1987); and *Oil Country Tubular Goods from Israel*, 52 FR 1649 (1987). This standard corresponds to item (j) of the Illustrative List, and a petitioner must allege that rates are manifestly inadequate to cover operating expenses and losses before the Department will investigate an export insurance program. *Carbon Steel Wire Rod from Singapore*, 50 FR 36130 (1985). The second sentence of paragraph (d)(1) makes clear that the Department will analyze both the viability of the particular insurance program in question and the overall commercial health of the entity operating the program.

As under current practice, in examining whether rates are manifestly inadequate, the Department will examine a five-year period, up to and including the year in question. *Oil Country Tubular Goods from Israel*, 52 FR 1649 (1987). The Department also will determine the aspect of the program used, *Brass Sheet and Strip from France*, 52 FR 1222 (1987), and will examine the annual reports and other books of the entity providing the insurance. *Id.*

Paragraph (d)(2) prescribes the method of valuing the benefit if the Secretary finds that premiums charged are manifestly inadequate. Under paragraph (d)(2), the Department will calculate the excess of the amount received by a firm over the amount of premiums paid by the firm, and this excess, if any, shall constitute the countervailable benefit. *Oil Country Tubular Goods from Israel*, 52 FR 1649 (1987).

Paragraph (e). Paragraph (e) codifies existing practice in determining when a foreign government's provision of equity to a firm confers a countervailable benefit. Under paragraph (e)(1), the preferred standard, an equity infusion confers a countervailable benefit when the market-determined price for equity purchased directly from the firm is less than the price paid by the foreign government for the same form of equity purchased directly from the firm. See, *e.g., Cold-Rolled Carbon Steel Flat-Rolled Products from Argentina*, 49 FR 18006 (1984). In this regard, in an exceptional situation the Department could find the volume of a firm's traded shares to be so low as to preclude the use of these shares as a "market-determined price." *Cf., Certain Steel Products from France*, 47 FR 39332 (1982). Also, as under current practice, the government purchase of previously issued shares on a market or directly from shareholders rather than from the firm would not constitute a countervailable benefit to the firm that issued the shares. See, *e.g.*, Appendix 2, *Certain Steel Products from Belgium*, 47 FR 39316 (1982) ("Appendix 2"); *Potassium Chloride from Spain*, 49 FR 36424 (1984); and *Iron Ore Pellets from Brazil*, 51 FR 21961 (1986).

If there is no market-determined price for a firm's shares (*e.g.*, the firm's shares are not publicly traded), paragraph (e)(1)(ii) provides that a government equity infusion constitutes a countervailable benefit if the firm was not equityworthy (*i.e.*, from the standpoint of a reasonable private investor, the firm was not a reasonable investment) and there is a rate of return shortfall within the meaning of § 355.49(e). Paragraph (e)(2) sets forth the basic criteria the Secretary will use in determining whether a firm is or is not equityworthy. The principal criterion is whether a reasonable private investor could expect from the firm a reasonable rate of return within a reasonable period of time. Subsidies Appendix at 18020. Factors that the Secretary may use to determine whether a firm can generate a reasonable rate of return include: (1) current and past indicators of a firm's financial health (*e.g.*, current ratio, cash flow, debt-equity ratio), adjusted for generally accepted accounting principles where appropriate, *see, e.g., Structural Shapes and Cold-Rolled Carbon Steel Flat-Rolled Products from Korea*, 49 FR 47284 (1984); *Certain Steel Products from South Africa*, 49 FR 32426 (1984)); (2) future financial prospects, *see, e.g., Certain Carbon Steel Products from Brazil*, 52 FR 829 (1987); *Stainless Steel Plate from the United Kingdom*, 51 FR 44656 (1986); (3) recent rate of return on equity, *see, e.g., Certain Carbon Steel Products from Brazil*, 49 FR 17988 (1984); and (4) participation by private investors, *compare, Carbon Steel Wire Rod from Trinidad and Tobago*, 49 FR 480 (1984), *with Fresh Atlantic Groundfish from Canada*, 51 FR 10041 (1986). In this regard, the Department intends to continue its practice of assessing the firm as a whole, rather than a particular product line, because a private investor would consider the firm as a whole in making an investment decision. See, *e.g., Fuel Ethanol from Brazil*, 51 FR 3361 (1986).

Paragraph (e)(3) codifies current Department practice to the effect that the Department will not investigate equity infusions in a firm absent a specific allegation by petitioner, supported by information reasonably available to petitioner, that: (1) The government actually has made an equity infusion in the firm; and (2) under one of the standards set forth in paragraph (e)(1), that infusion conferred a countervailable benefit. See, *e.g., Iron Ore Pellets from Brazil*, 51 FR 21961 (1986); and *Textile Mill Products from Mexico*, 50 FR 10824 (1985). The reason for this requirement is that investigations of equity infusions, like investigations of creditworthiness, add substantially to the work involved in a CVD investigation or review. Therefore, it is reasonable to require a petitioner to provide particular evidence of a countervailable equity infusion, as opposed to merely alleging that a government owns a firm in whole or in part.

Paragraph (e)(4) codifies existing Department practice with respect to the effect of subsidies on the equityworthiness of a firm. In the past, it has been argued that in assessing equityworthiness the Department should subtract subsidies received by a firm from the firm's financial data. In the Department's opinion, this approach results in the use of a standard different from that used by a private investor, who will look to the financial position of the firm at the time of the investment. In addition, this approach takes into account the secondary effects of subsidies, a highly speculative exercise which the Department has avoided in other contexts and which is not required by the statute. See Subsidies Appendix at 18023.

Paragraph (f). Paragraph (f) of section 355.44 sets forth the standard for determining when the provision by a government of a good or service confers

a countervailable benefit within the meaning of section 771(5)(A)(ii)(II) of the Act. Paragraph (f)(1) codifies the basic principle of existing Department practice, first articulated in *Certain Softwood Products from Canada*, 48 FR 24159, 24167 (1983), that the standard of "preferential," within the meaning of section 771(5)(A)(ii)(II), means more favorable treatment to some within the relevant jurisdiction than to others within that jurisdiction; it does not mean "inconsistent with commercial considerations." Paragraph (f)(1) adheres to this standard by providing that in determining whether the government provision of a good or service confers a countervailable benefit, the Secretary will compare the government price under scrutiny to a benchmark price, which normally will be the prices the government charges to the same or other users of the good or service within the same political jurisdiction.

In *Softwood Products*, however, the Department also recognized that in some cases, the number of users of a government-provided good or service might be so limited as to require the use of a different benchmark. *Id.*, note I. The Department faced this situation in its section 751 administrative review of the CVD order on *Carbon Black from Mexico*. In that case, the government-provided good in question was carbon black feedstock ("CBFS"), for which there were only two users in Mexico. The Department determined that given the limited number of users of CBFS, its standard test for determining "preferentiality" would not work. 51 FR 13269, 13271 (1986). Therefore, the Department considered alternative benchmarks, and issued a so-called "Preferentiality Appendix" describing these alternatives and requesting public comments. *Id.* at 13272. These alternatives were, in order of preference: (1) Prices charged by the same seller for a similar or related good or service; (2) prices charged within the jurisdiction by other sellers for an identical good or service; (3) the same seller's cost of producing the good or service; and (4) external prices. In *Carbon Black*, the Department used the first alternative.

Paragraph (f)(2) codifies the alternative benchmarks set forth in the Preferentiality Appendix. Thus, paragraph (f)(2) provides that where there is no nonselective benchmark price (*e.g.*, the normal benchmark either does not exist or is limited to a specific enterprise or industry or group thereof), the Secretary will use, in order of preference, the following benchmarks: (i) The price, adjusted for any cost differences, the government charges for a good or service which is similar or related to the good or service in question, provided that the similar or related good or service and its price is not selective; (ii) the price charged by other sellers to buyers within the same political jurisdiction for an identical good or service; (iii) the government's cost of providing the good or service; or (iv) the price paid for the identical good or service outside of the political jurisdiction in question. The reasons for selecting these alternatives and their ranking are set forth in the Preferentiality Appendix.

The Department is aware, however, of arguments in favor of a different ranking of the alternative benchmarks set forth in the Preferentiality Appendix. Therefore, before issuing final rules, the Department will reevaluate these alternatives and will consider carefully any comments concerning the selection of alternative benchmarks for determining the preferentiality of a good or service provided by a government.

Paragraph (g). Paragraph (g) of section 355.44, which corresponds to item (c) of the Illustrative List, codifies the Department's practice with respect to preferential transport or freight charges for export shipments. Paragraph (g)(1) restates the general rule that a countervailable benefit exists to the extent that a firm pays less for the transport of goods destined for export than it would for the transport of goods destined for domestic consumption. See, *e.g.*, *Ferrochrome from South Africa*, 46 FR 21155 (1981); and *Carbon Steel Plates and High Strength Steel Plates from Mexico*, 41 FR 1273 (1976). Where a firm pays the same basic charges regardless of whether a product is destined for export or for domestic consumption, a countervailable benefit does not exist under this paragraph, *Low-Fuming Brazing Copper Rod and Wire from South Africa*, 50 FR 31642 (1985), although a countervailable benefit still might exist under § 355.44(f).

Paragraph (g)(2) provides illustrative examples of situations in which a countervailable benefit does not exist: (i) Where the difference in charges is the result of an arm's length transaction between the supplier and the user of the transport or freight services, *see, e.g.*, *Miniature Carnations from Colombia*, 52 FR 32033 (1987); *Roses and Other Cut Flowers from Colombia*, 47 FR 2158 (1983); *Steel Wire Rope from South Africa*, 47 FR 40203 (1982); and *Lamb Meat from New Zealand*, 46 FR 58128 (1981); or (ii) where the difference in charges is commercially justified, *see, e.g.*, *Certain Steel Products from South Africa*, 47 FR 39379 (1982). In these situations, the government is not treating the firm paying the charges any differently than the market would treat the firm.

Paragraph (h). Paragraph (h), which corresponds to item (d) of the Illustrative List, deals with the government provision of goods pursuant to an export program.

Paragraph (i). Paragraph (i) of § 355.44 codifies existing Department practice with respect to programs providing tax or import charge benefits. The Department has encountered various types of these programs, and the various paragraphs of paragraph (i) describe the standards for determining the existence of a countervailable benefit with respect to each type.

Paragraph (i)(1), which deals with direct tax benefits, defines a countervailable benefit as the full or partial exemption, remission, or deferral of a direct tax or social welfare charge in excess of the tax which a firm otherwise would pay absent a government program. This paragraph also defines a countervailable benefit as a reduction in the base used to calculate a direct tax or social welfare charge in excess of the tax which a firm otherwise would pay absent a government program. Paragraph (i)(1), although it is not limited to export programs, corresponds to the export subsidies described in items (e) and (f) of the Illustrative List. See also Annex I, paragraph (4), to Part 355 of our current regulations and the following cases for examples of countervailable benefits under the proposed regulation: *Offshore Platform Jackets and Piles from Korea*, 51 FR 11779 (1986); *Low-Fuming Brazing Copper Rod and Wire from New Zealand*, 50 FR 31638 (1985); *Textile Mill Products and Apparel from the Philippines*, 50 FR 1607 (1985); *Textile Mill Products and Apparel from Argentina*, 50 FR 9846 (1985); *Pads for Woodwind Instrument Keys from Italy*, 49 FR 17793 (1984); and *Refrigeration Compressors from Singapore*, 48 FR 39109 (1983). As under existing practice, in determining the taxes a firm "otherwise would have paid," the Department will take account of the effects on a firm's total tax liability as a result of a firm's use of a tax subsidy. See, *e.g.*, *Lamb Meat from New Zealand*, 53 FR 47 (1988), and the discussion of the calculation of EMDTI benefits.

Paragraph (i)(2) deals with domestic programs providing indirect tax and import charge benefits. Pursuant to paragraph (i)(2), a program confers a countervailable benefit to the extent that it relieves a firm of indirect taxes or

import charges that it otherwise would pay absent the program.

Paragraph (i)(3), which corresponds to item (g) of the Illustrative List, deals with export programs providing benefits with respect to final stage indirect taxes. Paragraph (i)(3) restates the existing rule that the nonexcessive exemption or remission of final stage indirect taxes does not confer a countervailable benefit. See, *e.g., Zenith Radio Corp.* v. *United States, supra.*

Paragraph (i)(4)(i), which corresponds to items (h) and (i) of the Illustrative List, deals with export programs providing indirect tax and/or import charge benefits. Paragraph (i)(4)(i) restates the existing rule that the nonexcessive exemption, remission, or deferral of prior stage cumulative indirect taxes and/or import charges levied on goods that are physically incorporated into the exported product does not confer a countervailable benefit. In this regard, paragraph (i)(4)(i) also codifies existing principles with respect to physical incorporation. See, *e.g.*, Annex I, paragraph (1), to Part 355 of our current regulations.

Where the amount exempted or rebated is excessive, the excessive amount constitutes the countervailable benefit. However, under paragraph (i)(4)(ii), which codifies the Department's existing linkage test for these types of tax and duty rebate programs, *see, e.g., Industrial Fasteners Group, American Importers Ass'n* v. *United States*, 710 F.2d 1576 (Fed. Cir. 1983), the entire amount of the rebate would constitute a countervailable benefit if the Secretary determined that the criteria of paragraph (i)(4)(ii) were not satisfied. See, *e.g., Certain Apparel from Thailand*, 50 FR 9818 (1985); and *Textile Mill Products and Apparel from Indonesia*, 49 FR 49672 (1984).

Paragraph (j). Paragraph (j) codifies existing practice with respect to foreign government programs that provide assistance to workers. Under existing practice, such assistance generally constitutes a countervailable benefit only to the extent that it relieves a firm of an obligation it otherwise normally would incur. See, *e.g.*, Appendix 2. Benefits which accrue only to workers do not constitute countervailable benefits. *Compare* Appendix 3, *Certain Steel Products from Belgium*, 47 FR 39304 (1982) (ECSC housing assistance); and *Certain Carbon Steel Products from Austria*, 50 FR 33369 (1985), *with Certain Carbon Steel Products from Sweden*, 50 FR 33375 (1985); and *Certain Steel Products from the United Kingdom*, 47 FR 39384 (1982) (ISITB training programs).

Paragraph (k). Paragraph (k) codifies existing practice concerning government assumption or forgiveness of a firm's debt. Thus, the first sentence of paragraph (k) provides that the assumption or forgiveness of a firm's outstanding debt provides a countervailable benefit equal to the outstanding principal and accrued unpaid interest at the time of the assumption or forgiveness. See Subsidies Appendix at 18020. Essentially, the Department will treat the assumption or forgiveness as if it were a grant within the meaning of § 355.44(a), and will value this "grant" in accordance with the principles of § 355.49. The second sentence of paragraph (k) provides that if the foreign government receives shares in a firm in return for assuming or forgiving all or part of a firm's outstanding debt, the government action shall be treated as an equity infusion in accordance with the standards of § 355.44(e). Subsidies Appendix at 18020.

Paragraph (l). Paragraph (l) codifies existing Department practice with respect to assistance provided for purposes of research and development. Under that practice, such assistance does not confer a countervailable benefit where the results of the research and development are made available to the public, including the U.S. competitors of the recipient of the assistance. See, *e.g.*, Appendix 2; *Roses from Israel*, 52 FR 3316 (1987); *Fuel Ethanol from Brazil*, 51 FR 3361 (1986); and *Certain Carbon Steel Products from Sweden*, 50 FR 33375 (1985). Although this practice was called into question in *Agrexco, Agricultural Export Co., Ltd.* v. *United States*, 604 F. Supp. 1238 (Ct. Int'l Trade 1985), the Department disagrees with that aspect of the decision, and, in any event, the decision has become moot due to the completion of subsequent administrative reviews of the CVD order in question.

It should be noted that a program providing assistance for research and development still must be selective, within the meaning of § 355.43, in order to constitute a countervailable subsidy. See, *e.g.*, Appendix 2; *Fuel Ethanol from Brazil*, 51 FR 3361 (1906); and *Lamb Meat from New Zealand*, 50 FR 37708 (1985). It also should be noted that if paragraph (1) does not apply to a program (*e.g.*, the results of the research are not publicly available), the Department would deal with any benefits provided under the program pursuant to one of the other paragraphs of § 355.44. For example, the Department would handle grants for research and development under § 355.44(a), loans under § 355.44(b), etc.

Paragraph (m). Paragraph (m) codifies existing Department practice with respect to certain types of export promotion activities. Most countries, including the United States, maintain general export promotion programs. As long as these programs provide only general informational services, they do not constitute a countervailable benefit. See, *e.g., Certain Textile and Textile Products from Mexico*, 44 FR 41003 (1979); *Cotton Sheeting and Sateen from Peru*, 48 FR 4501 (1983); and *Fresh Cut Flowers from Mexico*, 49 FR 15007 (1984). Thus, under paragraph (m), an export program limited to these sorts of general activities would not constitute a countervailable benefit, notwithstanding any other provision of § 355.44. However, if, for example, such activities promoted a specific product, *Fresh Atlantic Groundfish from Canada*, 51 FR 10041 (1986), or provided financial assistance to a firm, *see, e.g., Fresh Cut Flowers from Israel*, 52 FR 3316 (1987), these activities would not fall within the purview of paragraph (m), and could constitute a countervailable benefit under one of the other provisions of § 355.44.

Paragraph (n). Paragraph (n) codifies existing Department practice with respect to programs providing varying levels of benefits based upon differing eligibility criteria (sometimes referred to as "tiered programs"). Under existing practice, where certain benefits under a program are selective and others are nonselective, the Department determines the existence of a countervailable benefit by comparing the benefits received by a firm to the benefits it would have received under the most favorable, nonselective portion of the program in question. For example, in many CVD proceedings involving merchandise from Canada, the Department has dealt with the Canadian investment tax credit. Under Canadian tax law, the basic seven percent tax credit is so widely available and used in Canada that the Department has found it to be nonselective. Other, more favorable tax credits are available on a selective basis, however. In determining the countervailable benefit arising from the use of these selective tax credits, the Department compares a firm's tax savings arising from the use of these selective tax credits with what the firm's taxes would have been had it used only the seven percent tax credit. See, *e.g., Oil Country Tubular Goods from Canada*, 51 FR 15037 (1986); *see also, e.g., Iron-Metal Construction Castings from Mexico*, 50 FR 43262 (1985)

(FOGAIN); *Certain Apparel from Thailand*, 50 FR 9818 (1985); and *Textile Mill Products and Apparel from the Philippines*, 50 FR 1607 (1985).

Paragraph (n) supersedes any other provision of section 355.44 with respect to the selection of the benchmark used to determine the existence of a countervailable benefit. However, in order for paragraph (n) to apply, the Secretary must determine that a firm would have been eligible for nonselective benefits under a program.

Paragraph (o). Paragraph (o)(1) codifies current practice with respect to so-called "transnational benefits." Occasionally, the Department has encountered programs which are funded through foreign aid, either on a bilateral or multilateral basis. In such instances, the Department (and Treasury before it) has determined such programs to be noncountervailable, to the extent that funds for the program are not provided by the government of the country in question. See, *e.g.*, *Viscose Rayon Staple Fiber from Austria*, 45 FR 1468 (1980) (U.S. Marshall Plan); *Textiles and Textile Products from Pakistan*, 44 FR 2746 (1979) (Bilateral and multilateral aid); *Pig Iron from Brazil*, 48 FR 54091 (1983) (U.S. aid through Alliance for Progress); *Certain Steel Products from Korea*, 47 FR 57535 (1982) (War reparations paid by the Government of Japan to the Government of Korea); and *Textiles and Textile Products from Turkey*, 49 FR 32639 (1984) (World Bank). However, to the extent that the government of a country supplements such funding with its own funds, the latter funds could provide a countervailable benefit. *Fuel Ethanol from Brazil*, 51 FR 3361 (1986).

Paragraph (o)(2) codifies section 701(d) of the Act, as added by section 1315 of the 1988 Act. Paragraph (o)(2) contains an exception to the general rule of paragraph (o)(1) for situations involving the production of merchandise by an international consortium, the members of which receive countervailable subsidies from their respective home governments.

5. *Section 355.45.* Section 355.45 codifies existing Department practice with respect to upstream subsidies. The most complete descriptions of the Department's current practice are in the preliminary and final determinations in *Certain Agricultural Tillage Tools from Brazil*, 50 FR 24270 (1985), 50 FR 34525 (1985), respectively, and in *Fuel Ethanol from Brazil*, 51 FR 3361 (1986).

Paragraph (a) sets forth the general rule. In order to find an upstream subsidy under section 771A of the Act, three elements must exist. First, the input product must benefit from a "domestic," as opposed to an "export," countervailable subsidy. Second, the countervailable subsidy on the input product must bestow a competitive benefit on the merchandise. Third, the countervailable subsidy on the input product must have a significant effect on the cost of manufacturing or producing the merchandise.

Paragraph (b) sets forth the threshold elements that must be alleged before the Secretary will investigate an upstream subsidy allegation. These elements form the "reasonable basis to believe or suspect" standard contained in section 703(g) of the Act, a standard which is higher than the standard for initiating a CVD investigation. This threshold applies to an allegation contained in a petition (*see* 19 CFR 355.12(b)(8)), as well as an allegation made at a later stage of a proceeding.

Paragraph (c) defines "input product." It should be noted here that agricultural inputs are dealt with in paragraph (g), which incorporates the standards of section 771B of the Act, as added by the 1988 Act.

Paragraph (d) sets forth the standard for determining whether a "competitive benefit" exists, codifying the hierarchy of benchmarks set forth in *Agricultural Tillage Tools from Brazil*, 50 FR 24270 (1985). The preferred benchmark is the price charged by unsubsidized producers of the input product located in the same country as the producer of the merchandise. If there are no unsubsidized producers, but in a prior CVD proceeding the Secretary has determined that a domestic countervailable subsidy is bestowed on the input product, the Secretary could derive a benchmark by adjusting for the effects of the subsidy on the input. Alternatively, the Secretary could use a world market price for the input product.

Paragraph (e) establishes the standard for determining whether a "significant effect" on cost exists. Paragraph (e) codifies the standard used in the final determination in *Agricultural Tillage Tools from Brazil*, 50 FR 34525 (1985). While paragraph (e) sets forth certain presumptions based upon the ratio which the *ad valorem* subsidy rate on the input bears to the total production costs of the merchandise, this presumption is rebuttable through the presentation of particular evidence. Ultimately, the analysis involves a case-by-case determination of the degree to which demand for the merchandise is elastic. The more fungible the merchandise (*i.e.*, the more that it competes on the basis of price, rather than on quality or other non-price factors), the more likely is it that the countervailable subsidy on the input product will have a "significant" effect on cost.

Paragraph (f) provides that where the Secretary determines that an upstream subsidy exists, the Secretary will include an amount equal to the amount of competitive benefit in the subsidy rate for the merchandise.

Paragraph (g), which deals with processed agricultural products, codifies section 771B of the Act, as added by section 1313 of the 1988 Act. Essentially, if the criteria of paragraph (g) are satisfied, the Secretary will not apply an upstream subsidy analysis with respect to subsidies on raw agricultural products used in the production of processed agricultural products. Instead, the Secretary will deem subsidies on the raw product to be provided with respect to the processed product.

6. *Section 355.46.* Section 355.46 codifies the provisions of section 771(6) of the Act concerning offsets. Paragraph (a) reiterates the provisions of section 771(6). As under existing practice, the Department will construe narrowly the provisions of paragraph (a).

Paragraph (b) is intended to codify the current practice of ignoring the secondary tax consequences of a countervailable benefit. For example, some foreign governments may treat cash grants as revenue for income tax purposes. Under paragraph (b), the Department would ignore the fact that such grants may be subject to taxation. See, *e.g.*, *Welded Carbon Steel Pipe and Tube from Argentina*, 53 FR 37619 (1988).

7. *Section 355.47.* Section 355.47 deals with the allocation of benefits to particular products or markets and the calculation of *ad valorem* subsidy rates. In Departmental parlance, these matters fall under the rubric of "tying" and "denominators."

Paragraph (a). Paragraph (a) of § 355.47 codifies existing practice with respect to tied benefits (*e.g.*, a benefit bestowed specifically to promote the production of a particular product). The first sentence of paragraph (a) restates existing practice to the effect that where the Secretary determines that a benefit is tied to the production or sale of a particular product (or products), the Secretary will allocate the benefit fully to the product (or products). See, *e.g.*, Appendix 2. The second sentence of paragraph (a) restates a corollary principle that if the product (or products) to which the benefit is tied is a product other than the merchandise under investigation or review (see § 355.2(k) of the current regulations for the definition of "the merchandise"), no countervailable subsidy exists. See, *e.g.*, Appendix 2; and *Industrial*

Nitrocellulose from France, 52 FR 833 (1987).

The third sentence of paragraph (a) then describes the method for calculating the *ad valorem* subsidy rate where a benefit is tied to products included within "the merchandise." Paragraph (a)(1) provides that in the case of a domestic program, the Secretary will calculate the *ad valorem* rate by dividing the benefit received by a firm by the firm's total sales of the product (or products) to which the benefit is tied. Paragraph (a)(2) provides that in the case of an export program, the Secretary will calculate the *ad valorem* rate by dividing the benefit received by a firm by the firm's total exports of the product (or products) to which the benefit is tied.

Paragraph (b). Paragraph (b) of section 355.47 codifies existing Department practice with respect to benefits tied to sales to a particular market. The first sentence of paragraph (b) sets forth the general rule that where a benefit is tied to sales to a particular market, the Secretary will allocate the benefit fully to products sold in that market. The second sentence of paragraph (b) provides the corollary rule that where the benefit is tied to sales to a market other than the United States, no countervailable subsidy exists. See, *e.g.*, *Roses and Other Cut Flowers from Colombia*, 51 FR 44931 (1986); *Certain Table Wine from Italy*, 49 FR 6778 (1984); and *Apparel from Thailand*, 50 FR 9818 (1985).

The third sentence of paragraph (b) describes the method for calculating the *ad valorem* subsidy rate where a benefit is tied to sales to the United States. Under paragraph (b)(1), the Secretary will divide a firm's benefit by the firm's total exports to the United States. *Compare Circular Welded Carbon Steel Pipes and Tubes from Thailand*, 50 FR 32751 (1985), *with Cast-Iron Pipe Fittings from Brazil*, 50 FR 8755 (1985). Paragraph (b)(2) adds an additional refinement in that if a benefit is tied to the export of a particular product (or products) to the United States, the Secretary will calculate the subsidy rate by dividing a firm's benefit by the firm's exports of the particular product (or products) to the United States.

Paragraph (c). Paragraph (c) deals with untied benefits. The first sentence of paragraph (c)(1) provides that where a benefit is not tied to a particular product or market, the Secretary will allocate the benefit to all products produced by a firm where the benefit is received pursuant to a domestic program, and to all products exported by a firm where the benefit is received pursuant to an export program.

The second sentence of paragraph (c)(1) deals with the calculation of the *ad valorem* subsidy rate for untied benefits. Paragraph (c)(1)(i) provides that in the case of a domestic program, the Secretary will divide a firm's benefit by the firm's total sales. Paragraph (c)(1)(ii) provides that in the case of an export program, the Secretary will divide a firm's benefit by the firm's total exports.

Paragraph (c)(2) codifies existing practice by providing that the Secretary will treat equity infusions as untied benefits.

8. *Section 355.48.* Section 355.48 deals with the important concept of the timing of receipt of a countervailable benefit. The timing of receipt of a countervailable benefit dictates the year in which the Department expenses the benefit or the year in which the Department begins its allocation of the benefit over time or the calculation of an annual benefit pursuant to § 355.49.

Paragraph (a) describes the Department's general cash flow approach with regard to the timing of receipt of benefits. This general principle underlies the Department's practice with respect to particular programs.

Paragraph (b) then restates existing Department practice with respect to the timing of receipt of particular types of benefits. For benefits not described in paragraph (b), the Department would determine the timing of receipt in accordance with the general principle of paragraph (a).

Paragraph (c) provides for an exception to the rules set forth in paragraphs (a) and (b). In certain situations, the application of the general rule would enable certain countervailable subsidies to go unremedied. Typically, these situations involve "big ticket" items, the production and delivery of which may extend over several years. See, *e.g.*, *Offshore Platform Jackets and Piles from Korea*, 51 FR 11779 (1986). Paragraph (c) provides that where the Secretary determines it appropriate, the Secretary may depart from the rules set forth in paragraphs (a) and (b). Paragraph (c) also provides that where the Secretary decides to depart from the general rules, the Secretary must explain the reasons therefor.

9. *Section 355.49.* This section deals with the allocation of a countervailable benefit to one or more years. The subjects covered in this section often are lumped loosely under the general category of subsidy "valuation," subjects covered by both §§ 355.44 and 355.49. However, § 355.44 largely deals with the selection of the benchmarks against which various types of alleged subsidy programs are compared in order to determine whether a countervailable benefit exists. Section 355.49 deals primarily with the allocation of a countervailable benefit to one or more years. Some conceptual overlap between §§ 355.44 and 355.49 exists because for certain types of programs, as discussed below, the determination of the existence and amount of any countervailable benefit must be done on a *post hoc* basis.

It should be noted that the Act is largely silent with respect to certain practical aspects of administering the CVD law. The Department, building upon Treasury practice, has filled in these gaps through administrative practice. Under this practice, the Department measures subsidization on an annual basis. Typically, the review period in an investigation covers a single calendar or fiscal year. An administrative review may cover one or more years. In an investigation or review, the Department attempts to calculate the amount of countervailable benefits attributable to a particular year, generally transforming benefits bestowed in absolute amounts into *ad valorem* equivalents. Section 355.49 is based upon this practice of identifying and measuring subsidies on an annual basis.

Section 355.49(a) codifies existing practice by establishing a general rule concerning the allocation of countervailable benefits. Paragraph (a)(1) states the basic principle that the Secretary either must (1) expense the entire amount of a benefit to a single year, (2) allocate the benefit over two or more years, or (3) calculate an annual benefit for two or more years. The term "expense" in paragraph (a)(1) reflects existing Department terminology, and essentially means that the entire amount of the benefit is allocated to the year in which the benefit is deemed to be received under § 355.48.

The phrase "depending upon the nature of the benefit in question," while admittedly imprecise, is intended to reflect the fact that the choice between expensing versus allocation usually depends upon the precise nature of the benefit in question. Generally, the choice between expensing and allocation depends upon whether (1) the benefit in question is a recurring benefit, and (2) the Secretary can calculate a "grant equivalent" for the benefit at the time of its receipt (*i.e.*, the total amount of any countervailable benefit is not contingent upon future events or benchmarks). The phrase "calculate an annual benefit" refers to the practice of

determining an annual amount for those benefits that are not expensed, but also are not "allocated" because the Secretary cannot calculate a "grant equivalent" at the time of receipt.

Paragraphs (a) (2) and (3) are intended to compensate for the imprecision in paragraph (a)(1) by providing definitive guidance for certain types of benefits. Paragraph (a)(2) provides that recurring benefits (benefits which a firm receives, or is likely to receive, on an ongoing basis from review period to review period) shall be expensed. Typical examples of such benefits are direct tax exemptions or deductions, excessive rebates of indirect taxes or import duties, preferential short-term financing, and the preferential provision of goods and services. Factors the Department considers in determining whether a benefit is recurring are: (1) Whether the program providing the benefit is exceptional; (2) whether the program is of longstanding; and (3) whether there is any reason to believe that the program will not continue into the future. See, *e.g., Live Swine and Fresh, Chilled and Frozen Pork Products from Canada,* 50 FR 25097 (1985); and *Fresh Atlantic Groundfish from Canada,* 57 FR 10041 (1986).

Paragraph (a)(3) identifies those benefits that the Secretary will allocate over two or more review periods. Paragraph (a)(3)(i) restates existing practice with respect to nonrecurring grants and equity infusions found to confer a countervailable benefit as a result of a comparison to the market price for a firm's shares. See Subsidies Appendix at 18018. Under paragraph (a)(3)(i), the Secretary will allocate over time a nonrecurring grant or equity infusion where the total amount of all such grants or infusions received during a year under a particular program is equal to or greater than 0.50 percent of a firm's exports or total sales, as appropriate. The purpose of this rule is to avoid any anomalies caused by the interaction of the Department's allocation formula and the *de minimis* rule contained in § 355.7 of the Commerce Regulations. *Id.*

Paragraph (a)(3)(ii) provides that the Secretary will allocate over time benefits from long-term loans for which both the government and the benchmark interest rates are fixed. Essentially, these are loans for which the Secretary can calculate a "grant equivalent" of the countervailable benefit at the time of receipt of the loan.

Paragraph (b)(1) codifies existing practice by describing in general terms the process used for allocating grants and certain equity infusions over time. Paragraph (b)(1) prescribes a three-step process under which the Secretary will (1) calculate the amount of the countervailable benefit; (2) assign a discount rate; and (3) construct a benefit stream. See generally, Subsidies Appendix.

Paragraph (b)(2) prescribes the discount rate to be used, and constitutes a change from existing practice. As stated in the Subsidies Appendix, the Department has attempted to use a firm's "weighted cost of capital" ("WCC") as the discount rate. This is because a firm's time preference for money is determined by its expected rate of return on investment and operations at the time it receives a subsidy. The firm's cost of raising money, its WCC, is the best surrogate for the expected rate of return. Subsidies Appendix at 18017. However, we stated in the Subsidies Appendix that while the WCC was the most accurate discount rate, there were practical investigatory problems in using the WCC. *Id.* at 18017–18. Thus, we indicated that we might change this practice in the future "if difficulties in finding the information systematically prohibit us from using [the WCC] as a discount rate." *Id.* at 18018.

Since 1984, we rarely have been able to calculate a firm's WCC. Typically, we have been forced to use some alternative figure as a "best information" discount rate. See, *e.g., Industrial Nitrocellulose from France,* 51 FR 5386 (1986); *Carbon Black from Mexico,* 51 FR 13269 (1986); *Viscose Rayon Staple Fiber from Sweden,* 51 FR 29145 (1986); and *Stainless Steel Plate from the United Kingdom,* 51 FR 34112 (1986). Valuable time of Department staff and parties to proceedings has been wasted seeking a figure which, in most instances, turns out to be unavailable.

Therefore, paragraph (b)(2) establishes a new hierarchy of discount rates, replacing the WCC. Under paragraph (b)(2)(i), the preferred discount rate is a firm's cost of long-term fixed-rate debt. If this figure is not available, paragraph (b)(2)(ii) prescribes the use of the national average cost for long-term fixed-rate debt in the country in question. If the latter information is not available, paragraph (b)(2)(iii) authorizes the use of a discount rate which the Secretary considers to be the most appropriate in the particular case. The last sentence of paragraph (b)(2) restates existing practice by providing that the Secretary will select a discount rate based upon data for the year in which the foreign government and the firm reached agreement on the essential terms of the grant or equity infusion. Subsidies Appendix at 18017.

Paragraph (b)(3) codifies existing practice by setting forth the formula used to construct the benefit stream referred to in paragraph (b)(1)(iii). It should be noted that this formula codifies existing practice with respect to the number of years over which a grant or equity infusion is allocated ("n" in the formula). As drafted, the Department would continue to use the IRS tables as the standard for allocating grants and equity infusions. As drafted and as discussed below, the Department also would continue to use the life-of-the-loan as the allocation period for long-term loans.

However, as an alternative to the IRS tables and life-of-the-loan, the Department is considering using a fixed period of ten years as the allocation period for all types of nonexpensed benefits in all cases. This ten-year period would apply not only to grants and equity infusions covered by paragraph (b), but also would apply to loans and equity infusions covered by paragraphs (c) through (e) of § 355.49.

The reason for selecting a fixed ten-year period is that, as stated in the Subsidies Appendix at 18018, "[t]here are no economic or financial rules that mandate the choice of an allocation period." One can argue that theoretically, a subsidy benefits a firm forever, thereby rendering arbitrary any allocation period short of infinity. Moreover, the statute is silent with respect to the allocation of benefits over time, and what little legislative history there is on the subject deals with the "shape" of the benefit stream rather than its "length." See S. Rep. No. 261, 96th Cong., 1st Sess. 85–86 (1979). At most, the legislative history exhorts the Department to use a "reasonable" method of allocation. *Id.*

In determining a "reasonable" allocation period, the Department must balance the conflicting demands of the statute. The period selected must be substantively fair to the interests of both domestic and foreign parties. However, the Department must select a period which facilitates the administration of the statute in a timely manner, and which offers predictability for domestic and foreign parties. Thus far, the alternatives considered by the Department have suffered from one or more drawbacks. The use of firms' accounting useful life as reflected in their records suffers from the fact that a firm may select a useful life for a variety of reasons, such as tax liability. Thus, to use firms' accounting useful life could result in drastically different benefit amounts even though firms might be receiving identical subsidies and might

be otherwise identically situated. Likewise, the tax tables of other countries often are designed to promote certain governmental objectives, and do not necessarily reflect the useful life of assets. Moreover, to use the tax tables of the country under investigation would produce different benefit amounts between countries.

Although the IRS tables provide consistency and predictability, the Department is concerned that those tables are dated. Moreover, the premise that the duration of the benefit from a subsidy differs (or should differ) depending on the industry in question is debatable. As for the Department's life-of-the-loan allocation method, one can argue that the duration of a benefit should not depend upon the form in which the benefit is conferred.

Therefore, as stated above, the Department is considering the use of a ten-year period for all nonexpensed benefits. Based upon the Department's experience with these types of benefits, the use of a ten-year period would provide adequate protection to domestic parties and would be fair to foreign producers. In addition, the use of a ten-year period would ensure consistency and predictability of results, and, from the Department's standpoint, would be more administrable than the alternatives.

Before adopting this approach, however, the Department wishes to receive comments on: (1) The use of a set allocation period for all types of nonexpensed benefits; and (2) the selection of ten years, as opposed to some other time period.

Paragraph (c)(1) describes the process for allocating certain long-term loans over time. As set forth in paragraph (a)(3)(ii), these are loans for which the government and benchmark interest rates are long-term, fixed rates. Thus, the Department is able to calculate a "grant equivalent" for these types of loans. Paragraph (c)(1) describes a three-step allocation process similar to the one in paragraph (b)(1) for grants and equity infusions. The principal difference is that pursuant to paragraph (c)(1)(i), the Secretary must determine the "grant equivalent" of the loan by calculating the present value of the difference in payments between the government loan and the benchmark loan. Paragraph (c)(2) sets forth the present value formula for calculating this grant equivalent, using the benchmark rate as the discount rate. The last sentence of paragraph (c)(2) reflects existing Department practice concerning the so-called "grant cap." In order to avoid calculating a benefit greater than if the Department treated the loan as a grant, the amount calculated under paragraph (c)(2) may not exceed the face value of the loan principal.

Paragraph (c)(3) sets forth the discount rate to be used for purposes of allocating the benefit from the loan over time. This is the same discount rate used to calculate the grant equivalent under paragraph (c)(2); namely, the benchmark rate. It should be noted that as under existing practice, in the case of a long-term loan to an uncreditworthy firm, the Department would use the "risk premium" benchmark rate calculated under § 355.44(b)(6)(iv). See *Stainless Steel Plate from the United Kingdom*, 51 FR 34112 (1986).

Paragraph (c)(4) sets forth the formula for constructing the benefit stream pursuant to paragraph (c)(1)(iii), and reflects existing practice. As noted above, if the Department were to adopt a fixed ten-year allocation period for all benefits, "n" in the formula would be ten years, rather than the number of years in the life of the loan.

Paragraph (d) deals with the calculation of the annual benefit from long-term loans for which the Secretary cannot calculate a grant equivalent; *i.e.*, loans for which either the government or benchmark interest rate is not a long-term, fixed rate. Paragraph (d)(1) provides that for each year in which the loan is outstanding, the Secretary will determine the amount of the "loan differential"; *i.e.*, the difference between what the firm paid during the year under the government loan and what the firm would have paid during the year under the benchmark loan. This loan differential is the countervailable benefit for the particular year.

Paragraph (d)(2) provides that the number of years in which a long-term loan is capable of conferring a countervailable benefit shall be the number of years in the loan. Thus, for example, in the case of a loan with a life of ten years, the last year in which the loan could be capable of providing a countervailable benefit would be the tenth year of the loan. Again, however, if the Department adopts a fixed ten-year allocation period for all benefits, the number of years would be ten years, rather than the number of years in the life of the loan.

Under existing practice, the Department will not assess countervailing duties attributable to a loan in an amount greater than that which would be calculated if the Department simply treated the loan as a grant. Paragraph (d)(3) codifies this principle by providing that the amount calculated under paragraph (d)(1) may not exceed the amount that would have been calculated if the Secretary had treated the loan principal as a grant and calculated the annual benefit pursuant to § 355.49(b).

Paragraph (e) codifies the Department's so-called "rate of return shortfall" method for valuing equity infusions found to be countervailable pursuant to § 355.44(e)(1)(ii); *i.e.*, infusions in unequityworthy firms for which there are no market-determined share prices. See Subsidies Appendix at 18020. Under this method, in a given year, the Secretary will multiply the amount of the equity infusion by the difference between a firm's rate of return on equity and the average rate of return on equity for firms in the country in question. The Secretary will use rates of return for the year in question. The Secretary then will use the product of this multiplication as the amount of the countervailable benefit attributable to the equity infusion for the particular year. The last sentence of paragraph (e)(1) codifies existing practice with respect to dividend payments. If a firm pays dividends to its government during the year in which the Secretary is measuring the rate of return shortfall, the Secretary will subtract the amount of the dividends paid in calculating any countervailable benefit, provided that such dividends were not included in the firm's rate of return. See, *e.g.*, *Certain Carbon Steel Products from Sweden*, 50 FR 33375 (1985).

Paragraph (e)(2) provides that the number of years in which an equity infusion is capable of conferring a countervailable benefit shall be the average useful life of the firm's renewable physical assets, as set forth in the IRS tables. Thus, for example, in the case of a firm for which the average useful life of assets is ten years, the last year in which an equity infusion could be capable of providing a countervailable benefit would be the tenth year from the date of receipt of the equity infusion. Again, if the Department adopts a fixed ten-year period, the number of years would be ten, rather than the useful life as set forth in the IRS tables.

Under existing practice, the Department will not assess countervailing duties under the rate of return shortfall method in an amount greater than that which would be calculated if the Department simply treated the infusion as a grant. Paragraph (e)(3) codifies this principle by providing that in no event will the Secretary calculate a benefit greater than the "grant cap." The mechanics of calculating a grant cap under paragraph (e)(3) are identical to those for

calculating the grant cap for a loan under paragraph (d)(3).

Paragraph (f) deals with programs under which a government provides a long-term interest-free loan to a firm, the obligation for repayment of which is contingent upon subsequent events, such as the achievement of a particular profit level by a firm. Paragraph (f) codifies current practice by providing that in a given year the Secretary will treat any outstanding balance as an interest-free short-term loan, using the short-term loan benchmark called for in § 355.44(b)(3), and shall expense any resulting countervailable benefit to the year in question.

Paragraph (f) does not deal with all of the different types of contingent liability programs that the Department has encountered thus far. However, the Department's experience with such programs is still relatively limited, and we prefer to gain additional experience before further codifying our methodology with respect to such programs. In general, however, the Department's methodology concerning these programs has been consistent with the principles set forth in paragraph (f).

Paragraph (g) deals with government forgiveness of loans. If during a year, the government forgives all or part of the loan, the Secretary will treat such forgiveness as a grant to the firm and shall expense or allocate the grant, as appropriate.

Paragraph (h) is intended to deal with benefits not covered elsewhere in § 355.49. Although § 355.49 encompasses most of the programs dealt with by the Department, occasionally the Department encounters programs that require a modification of the Department's standard methodology. Paragraph (h) provides that in valuing the benefits from such unusual programs, the Department will apply the underlying principles of § 355.49.

10. *Section 355.50.* Section 355.50 codifies existing Department practice with respect to program-wide changes. In an investigation or administrative review, the Department typically bases its determination on an analysis of countervailable subsidies conferred during a clearly delineated review period. In an investigation, the Department's analysis of subsidy activity during this review period will dictate whether the final determination is affirmative or negative. In an administrative review, the Department's analysis of subsidy activity during the review period will form the basis for the CVD assessment rate. In both investigations and administrative reviews, the Department's analysis of subsidy activity during the review period also normally forms the basis of the estimated CVD cash deposit rate. However, pursuant to established practice, which the Department first articulated in *Textile Mill Products and Apparel from Peru,* 50 FR 9871 (1985), the Department will adjust the cash deposit rate to take into account certain changes in subsidy programs occurring after the review period, but prior to a preliminary determination or preliminary results of administrative review.

Paragraph (a) of § 355.50 sets forth the general rule, which is that the Department will adjust the cash deposit rate for program-wide changes occurring subsequent to the review period, but before a preliminary determination (in an investigation) or a preliminary results of review (in an administrative review). This adjustment may either increase or decrease the subsidy rate found during the review period. Pursuant to paragraph (a)(2), the Secretary must be able to measure the change in the level of countervailable subsidies provided under the program in question. For example, in the case of certain loan programs, there may be many factors affecting the subsidy rate, not all of which can be quantified in advance. See, *e.g., Textile Mill Products from Thailand,* 52 FR 7636 (1987); and *Textile Mill Products from Mexico,* 50 FR 10824 (1985); *see also, Live Swine from Canada,* 53 FR 22189 (1988).

Paragraph (b) defines "program-wide" change for purposes of § 355.50. First, the change must not be limited to an individual firm or firms. See, *e.g., Heavy Iron Construction Castings from Brazil,* 51 FR 9491 (1986); and *Offshore Platform Jackets and Piles from Korea,* 51 FR 11779 (1986). In this regard, the Department would treat the exclusion of particular products from eligibility for benefits under a program as a program-wide change. *Textile Mill Products and Apparel from Peru,* 50 FR 9871 (1985). Second, the change must be implemented by an official act, such as the enactment of a statute or regulation or the issuance of a decree, or be contained in the schedule of an existing statute, regulation, or decree.

Paragraph (c) clarifies that the program-wide change rule applies only to the calculation of the cash deposit rate. It does not affect the characterization of a determination as affirmative or negative, such characterization being based solely on the analysis of subsidy activity during the applicable review period.

Paragraph (d) deals with situations in which a government terminates a program. Pursuant to paragraph (d)(1), if the Secretary determined that residual benefits continued to be bestowed under the terminated program, the Secretary would not adjust the deposit rate. Also, pursuant to paragraph (d)(2), if a government introduced a substitute program in place of the terminated program and the Secretary was unable to measure the amount of countervailable subsidies provided under the new program, the Secretary would not adjust the cash deposit rate pursuant to paragraph (a). See *Lamb Meat from New Zealand,* 50 FR 37708 (1985); *cf., Textile Mill Products and Apparel from Argentina,* 50 FR 9846 (1985).

11. *Section 355.51.* Section 355.51 codifies the current method of calculating the weighted-average net subsidy rate on a country-wide basis. As provided in § 355.20(d) and § 355.22(d), the Secretary normally will calculate a country-wide subsidy rate, unless the rate for an individual firm is significantly different from the country-wide rate.

Drafting Information

The principal author of this document is William D. Hunter, Deputy Chief Counsel for Import Administration, U.S. Department of Commerce. Other personnel in the Office of the Chief Counsel for Import Administration and in Import Administration also provided valuable assistance.

List of Subjects in 19 CFR Part 355

Business and industry, Foreign trade, Imports, Trade practices.

Dated: April 27, 1989.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

For the reasons stated in the preamble, we propose to amend 19 CFR Part 355 as follows:

PART 355—[AMENDED]

1. Current Subpart D of Part 355 is redesignated as Subpart E, and current §§ 355.41 through 355.45 are redesignated as §§ 355.61 through 355.65, respectively.

2. The authority citation for 19 CFR Part 355 is amended to read as follows:

Authority: The authority for Part 355, except as otherwise noted below, is 5 U.S.C. 301; 19 U.S.C. 1303; 19 U.S.C. 2501 note; Title VII of the Tariff Act of 1930 (19 U.S.C. Subtitle IV, Parts II, III, and IV), as amended by Title I of the Trade Agreements Act of 1979, Pub. L. 96–39, 93 Stat. 150; section 221 and Title VI of the Trade and Tariff Act of 1984, Pub. L. 98–573, 98 Stat. 2948; Title XVIII, Subtitle B, Chapter 3, of the Tax Reform Act of 1986, Pub. L. 99–514, 100 Stat. 2085, 2919; and Title I, Subtitle C, Part 2, of the Omnibus

Trade and Competitiveness Act of 1988, Pub. L. 100–418, 102 Stat. 1184.

The authority for § 355.12(h) is section 650 of Pub. L. 98–181 (November 30, 1983), which added sections 702(b)(3), 703(b)(2), and 708 to the Tariff Act of 1930, 19 U.S.C. 1671a(b)(3), 1671b(b)(2), and 1671g.

The authority for §§ 355.61 through 355.65 is section 702 of the Trade Agreements Act of 1979, 19 U.S.C. 1202 note.

§ 355.2 [Amended]

3. Section 355.2(h), 19 CFR 355.2(h), is revised to read as follows:

(h) *Industry.* Except for purposes of Subpart D, "industry" means the producers in the United States collectively of the like product, except those producers in the United States that the Secretary excludes under section 771(4)(B) of the Act on the grounds that they are also importers (or are related to importers, producers, or exporters) of the merchandise. Under section 771(4)(C) of the Act, an "industry" may mean producers in the United States, as defined above in this paragraph, in a particular market in the United States if such producers sell all or almost all of their production of the like product in that market and if the demand for the like product in that market is not supplied to any substantial degree by producers of the like product located elsewhere in the United States.

4. Section 355.2, 19 CFR 355.2, is amended by adding paragraph (r) to read as follows:

§ 355.2 [Amended]

(r) *Program.* "Program" means any act or practice of a government.

5. The Table of Contents to Part 355 is amended by adding new Subparts D and E to read as follows:

Subpart D—Identification and Measurement of Countervailable Subsidies

Sec.

Subpart E—Quota Cheese Subsidy Determinations

6. A new Subpart D is added to 19 CFR Part 355, to read as follows:

Subpart D—Identification and Measurement of Countervailable Subsidies

§ 355.41 Definitions.

The following definitions apply for purposes of this subpart:

(a) *Firm.* "Firm" means any individual, partnership, corporation, association, organization, or other entity.

(b) *Government.* "Government" means the government of a country, as defined in § 355.2(d), and includes any entity controlled by a government.

(c) *Direct tax.* "Direct tax" means a tax on wages, profits, interest, rents, royalties, and all other forms of income, and a tax on the ownership of real property.

(d) *Indirect tax.* "Indirect tax" means a sales, excise, turnover, value added, franchise, stamp, transfer, inventory, or equipment tax, a border tax, and any tax other than a direct tax or an import charge.

(e) *Import charge.* "Import charge" means a tariff, duty, or other fiscal charge which is levied on imports, other than an indirect tax defined in paragraph (d) of this section.

(f) *Prior stage indirect tax.* "Prior stage indirect tax" means an indirect tax levied on goods or services used directly or indirectly in making a product.

(g) *Cumulative indirect tax.* "Cumulative indirect tax" means a multi-staged indirect tax levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to tax at one stage of production are used in a succeeding stage of production.

(h) *Infrastructure.* "Infrastructure" includes, but is not limited to, roads, ports, railway lines, and industrial estates.

(i) *Short-term loan.* "Short-term loan" means a loan, the terms of repayment for which are one year or less.

(j) *Long-term loan.* "Long-term loan" means a loan, the terms of repayment for which are greater than one year.

(k) *Provide; Provided.* "Provide" or "provided" means provided directly or indirectly by a government, or required by government action.

(l) *Export insurance. "Export insurance"* includes, but is not limited to, insurance against increases in the cost of exported products, nonpayment by the customer, inflation, or exchange rate risks.

§ 355.42 Existence of a countervailable subsidy.

A countervailable subsidy exists when the Secretary determines that:

(a) A program provides selective treatment to a product or firm; and

(b) A program provides a countervailable benefit with respect to the merchandise.

§ 355.43 Selective treatment.

(a)(1) *Export programs.* Selective treatment, and a potential countervailable export subsidy, exists where the Secretary determines that eligibility for, or the amount of, benefits under a program is tied to actual or anticipated exportation or export earnings.

(2) Where exportation is only one of many eligibility criteria for benefits under a program, the inclusion of exportation as a criterion shall not *per se* constitute selective treatment within the meaning of paragraph (a)(1) of this section.

(b)(1) *Domestic programs.* Selective treatment, and a potential countervailable domestic subsidy, exists where the Secretary determines that benefits under a program are provided, or are required to be provided, in law or in fact, to a specific enterprise or industry, or group of enterprises or industries.

(2) In determining whether benefits are specific under paragraph (b)(1) of this section, the Secretary will consider, among other things, the following factors:

(i) The extent to which a government acts to limit the availability of a program;

(ii) The number of enterprises, industries, or groups thereof that actually use a program;

(iii) Whether there are dominant users of a program, or whether certain enterprises, industries, or groups thereof receive disproportionately large benefits under a program; and

(iv) The extent to which a government exercises discretion in conferring benefits under a program.

(3) The Secretary will deem a program to be specific within the meaning of paragraph (b)(1) of this section, if the Secretary determines that benefits under a program are limited to enterprises or industries located in a specific region or regions of a country. In applying this paragraph, the Secretary may consider the proportion of enterprises or industries located in the region or regions in question as compared with the rest of the country.

(4) The Secretary will not regard the provision of infrastructure by a

government as specific within the meaning of paragraph (b)(1) of this section, provided the Secretary determines that:

(i) The government does not limit who can move into the area where the infrastructure has been built;

(ii) The infrastructure that has been built is in fact used by more than a specific enterprise or industry, or group thereof; and

(iii) Those that locate in the area have equal access to, or receive the benefit of, the infrastructure on the basis of neutral and objective criteria.

(5) Where a benefit is provided pursuant to a program of a state, provincial, or local government, the Secretary will determine the specificity of the benefit for purposes of paragraph (b)(1) of this section based upon the availability and use of the program within the state, provincial, or local jurisdiction of the government in question.

(6) Unless the Secretary determines that two or more programs are integrally linked, the Secretary will determine the specificity of a program for purposes of paragraph (b)(1) of this section solely on the basis of the availability and use of the particular program in question. In determining whether programs are integrally linked, the Secretary will examine, among other factors, the administration of the programs, evidence of a government policy to treat industries equally, the purposes of the programs as stated in their enabling legislation, and the manner of funding the programs.

(7) The Secretary will not regard a program as being specific, within the meaning of paragraph (b)(1) of this section, solely because the program is limited to small firms or small- and medium-sized firms.

(8) The Secretary will not regard a program as being specific, within the meaning of paragraph (b)(1) of this section, solely because the program is limited to the agricultural sector.

§ 355.44 Existence of a countervailable benefit.

(a) *Grants.* In the case of a program providing a grant, a countervailable benefit exists in the amount of the grant.

(b)(1) *Loans.* A loan provided by a government confers a countervailable benefit to the extent that the amount paid by a firm for the government loan is less than what the firm would pay for a benchmark loan.

(2) In making the comparison required under paragraph (b)(1) of this section, the Secretary will take into account any deferral of principal repayments or interest payments on a government loan. Unless such deferral is a normal or customary lending practice in the country in question, the deferral of principal repayments or interest payments provides a countervailable benefit to the extent that the deferral results in a total loan repayment that is less than the repayment would have been in the absence of the deferral.

(3)(i) In the case of a short-term loan provided by a government, the Secretary will use as a benchmark the average interest rate for an alternative source of short-term financing in the country in question. In determining this benchmark, the Secretary normally will rely upon the predominant source of short-term financing in the country in question. Where there is no single, predominant source of short-term financing, the Secretary may use a benchmark composed of the interest rates for two or more sources of short-term financing in the country in question, weighted, wherever possible, according to the value of financing from each source.

(ii) For purposes of paragraph (b)(3)(i) of this section, "predominant" means that type of short-term financing the total value of which is greater than or equal to 50 percent of the total value of short-term financing, in local currency, in the relevant country.

(iii) For purposes of paragraph (b)(3)(i) of this section, unless short-term interest rates in the country in question have fluctuated significantly during the year in question, the Secretary will calculate a single, annual average benchmark interest rate.

(4) In the case of a long-term loan provided by a government for which the interest rate is fixed, the Secretary will use as a benchmark the following, in order of preference:

(i) The interest rate on a fixed-rate, long-term loan taken out in the same year by the firm receiving the government loan;

(ii) The interest rate on a fixed-rate debt obligation issued in the same year by the firm receiving the government loan;

(iii) The interest rate on a variable-rate, long-term loan taken out in the same year by the firm receiving the government loan;

(iv) The national average long-term fixed interest rate in the country in question;

(v) The national long-term variable interest rate in the country in question; or

(vi) A short-term benchmark rate determined in accordance with paragraph (b)(3) of this section.

(5) In the case of a long-term loan provided by a government for which the interest rate is variable, the Secretary will use as a benchmark the following, in order of preference:

(i) The interest rate on a variable-rate, long-term loan taken out in the same year by the firm receiving the government loan;

(ii) the interest rate on a fixed-rate, long-term loan taken out in the same year by the firm receiving the government loan;

(iii) The interest rate on a fixed-rate debt obligation issued in the same year by the firm receiving the government loan;

(iv) The national average long-term variable interest rate in the country in question;

(v) The national average long-term fixed interest rate in the country in question; or

(vi) A short-term benchmark rate determined in accordance with paragraph (b)(3) of this section.

(6)(i) The Secretary will deem a firm to be uncreditworthy if the Secretary determines that the firm did not have sufficient revenues or resources to meet its costs and fixed financial obligations in the three years prior to the year in which the firm and the government agreed upon the terms of the loan. The Secretary will determine creditworthiness on a case-by-case basis, and may examine, among other factors, the following:

(A) The receipt by a firm of comparable long-term commercial loans;

(B) The present and past financial health of a firm, as reflected in various financial indicators calculated from the firm's financial statements and accounts;

(C) A firm's recent past and present ability to meet its costs and fixed financial obligations with its cash flow; and

(D) Evidence of a firm's future financial position, such as market studies, country and industry economic forecasts, and project and loan appraisals.

Normally, the receipt by a firm of comparable long-term commercial loans, provided without an explicit government guarantee, shall constitute dispositive evidence that the firm is creditworthy.

(ii) The Secretary normally will not consider the creditworthiness of a firm absent a specific allegation by the petitioner which is supported by information establishing a reasonable basis to believe or suspect that the firm is uncreditworthy.

(iii) In making a determination under paragraph (b)(6)(i), the Secretary will ignore countervailable subsidies that currently benefit the firm or that benefited the firm in the past.

(iv) Notwithstanding paragraph (b)(4) of this section, if the Secretary deems a firm to be uncreditworthy pursuant to paragraph (b)(6)(i) of this section, the Secretary will calculate the benchmark interest rate for a long-term government loan by taking the sum of 12 percent of the prime interest rate in the country in question and:

(A) If the government loan has a fixed interest rate, in order of preference:

(1) The highest long-term fixed interest rate commonly available to firms in the country in question;

(2) The highest long-term variable interest rate commonly available to firms in the country in question; or

(3) The short-term benchmark interest rate determined in accordance with paragraph (b)(3) of this section; or

(B) If the government loan has a variable interest rate, in order of preference:

(1) The highest long-term variable interest rate commonly available to firms in the country in question;

(2) The highest long-term fixed interest rate commonly available to firms in the country in question; or

(3) The short-term benchmark interest rate determined in accordance with paragraph (b)(3) of this section.

(v) In determining whether a short-term loan provided by a government confers a countervailable benefit, the creditworthiness of a firm will be irrelevant.

(7) In identifying a benchmark under paragraph (b) of this section, the Secretary will attempt to use, where possible, a nongovernment source of financing. Where necessary, however, the Secretary may use loans made available under one or more government programs, provided that any such program is not deemed to be selective within the meaning of § 355.43.

(8) In comparing a government loan with a benchmark loan under paragraph (b) of this section, the Secretary will compare the effective interest rate of the government loan with the effective interest rate of the benchmark loan. Where the Secretary cannot quantify the effective rate, either with respect to the government loan or the benchmark loan, the Secretary will compare the nominal interest rate of the government loan with the nominal interest rate of the benchmark loan. Only as a last resort will the Secretary compare a nominal interest rate with an effective interest rate in establishing the interest rate differential.

(9) Notwithstanding § 355.41(b), the Secretary will not consider a loan provided by a government-owned bank, *per se*, to be a loan provided by the government, and the Secretary will not investigate a loan from a government-owned bank absent a specific allegation which is supported by information establishing a reasonable basis to believe or suspect that:

(i) The government-owned bank provided the loan at the direction of the government or with funds provided by the government, and

(ii) The terms of the loan were inconsistent with commercial considerations.

(c)(1) *Loan guarantees.* In the case of an explicit guarantee by a government of a loan to a firm, a countervailable benefit exists to the extent the Secretary determines that:

(i) The price or fee paid by the firm for the government guarantee is less than the price the firm would have paid for a comparable commercial guarantee, or

(ii) The amount paid by the firm for the guaranteed loan is less than what the firm would have paid for benchmark financing pursuant to paragraph (b) of this section.

(2) The explicit guarantee by a government of a loan to a firm shall not confer a countervailable benefit if the government is a principal owner or majority shareholder of the firm and it is a normal commercial practice in the country in question for owners or shareholders to provide loan guarantees on comparable terms to their firms.

(d)(1) *Export insurance.* The provision by a government of export insurance confers a countervailable benefit to the extent the Secretary determines that the premium rates charged are manifestly inadequate to cover the long-term operating costs and losses of the program over the past five years, up to and including the year in question. In determining whether premium rates are manifestly inadequate, the Secretary will determine whether there is a substantial gap between premiums charged and costs and losses incurred under the program, and will take into account income from other insurance programs operated by the entity in question.

(2) Where the Secretary determines that the premium rates charged are manifestly inadequate, the Secretary will calculate the amount of the countervailable benefit by calculating the excess of the amount received by a firm over the amount of premiums paid by the firm.

(e)(1) *Equity.* The provision of equity by a government to a firm confers a countervailable benefit to the extent the Secretary determines that:

(i) The market-determined price for equity purchased directly from the firm is less than the price paid by the government for the same form of equity purchased directly from the firm; or

(ii) In the event that there is no market-determined price, the firm is not equityworthy and there is a rate of return shortfall within the meaning of § 355.49(e).

(2) A firm is equityworthy within the meaning of paragraph (e)(1)(ii) of this section if the Secretary determines that, from the perspective of a reasonable private investor examining the firm at the time the government equity infusion was made, the firm showed an ability to generate a reasonable rate of return within a reasonable period of time. In making this determination, the Secretary may examine the following factors, among others:

(i) Current and past indicators of a firm's financial health calculated from that firm's statements and accounts, adjusted, if appropriate, to conform to generally accepted accounting principles;

(ii) Future financial prospects of the firm, including market studies, economic forecasts, and project or loan appraisals;

(iii) Rates of return on equity in the three years prior to the government equity infusion; and

(iv) Equity investment in the firm by private investors.

(3) The Secretary will not investigate an equity infusion in a firm absent a specific allegation by the petitioner which is supported by information establishing a reasonable basis to believe or suspect that a firm has received an equity infusion which provides a countervailable benefit within the meaning of paragraph (e)(1) of this section.

(4) In making a determination under paragraph (e)(2) of this section, the Secretary will ignore countervailable subsidies that currently benefit the firm or benefited the firm in the past.

(f)(1) *Provision of goods or services at preferential rates.* The provision by a government of a good or service pursuant to a domestic program confers a countervailable benefit to the extent the Secretary determines that the price charged by the government for the good or service is less than the benchmark price, which normally will be the nonselective prices the government charges to the same or other users of the good or service within the same political jurisdiction.

(2) Where the Secretary determines that there is no benchmark price under paragraph (f)(1) which is not selective within the meaning of § 355.43, the Secretary will determine the existence of a countervailable benefit based upon,

in order of preference, the following alternative benchmarks:

(i) The price, adjusted for any cost differences, the government charges for a good or service which is similar or related to the good or service in question, provided that the similar or related good or service and its price is not selective within the meaning of § 355.43;

(ii) The price charged by other sellers to buyers within the same political jurisdiction for an identical good or service;

(iii) The government's cost of providing the good or service; or

(iv) The price paid for the identical good or service outside of the political jurisdiction in question.

(g)(1) *Internal transport and freight charges for export shipments.* Where a government provides internal transport and freight services pursuant to an export program, a countervailable benefit exists to the extent the Secretary determines that the charges paid by a firm for transport or freight with respect to goods destined for export are less than what the firm would have paid if the goods were destined for domestic consumption.

(2) For purposes of paragraph (g)(1), a countervailable benefit does not exist where the Secretary determines that:

(i) Any difference in charges is the result of an arm's length transaction between the supplier and the user of the transport or freight service; or

(ii) The difference in charges is commercially justified.

(h) *Price preferences for inputs used in the production of goods for export.* The delivery by a government of imported or domestic products for use in the production of exported goods confers a countervailable benefit to the extent the Secretary determines that the terms or conditions are more favorable than for delivery of like or directly competitive products or services for use in the production of goods for domestic consumption, and if such terms or conditions are more favorable than those commercially available on world markets to their exporters.

(i)(1) *Taxes and import charges.* A countervailable benefit exists to the extent the Secretary determines that the taxes paid by a firm are less than the taxes it otherwise would have paid in the absence of a program providing for:

(i) A full or partial exemption, remission, or deferral of a direct tax or social welfare charge; or

(ii) A reduction in the base used to calculate a direct tax or social welfare charge.

(2) A countervailable benefit exists to the extent the Secretary determines that the taxes or import charges paid by a firm are less than the taxes it otherwise would have paid in the absence of a domestic program providing for the full or partial exemption, remission, or deferral of an indirect tax or import charge.

(3) The exemption or remission upon export of indirect taxes not in excess of those levied with respect to the production and distribution of like products when sold for domestic consumption shall not confer a countervailable benefit.

(4)(i) The exemption, remission, deferral or drawback of prior stage cumulative indirect taxes on goods or services used in the production of exported products in excess of the exemption, remission, deferral or drawback of like prior stage cumulative indirect taxes on goods or services used in the production of like products when sold for domestic consumption shall confer a countervailable benefit; provided that the nonexcessive exemption, remission, deferral, or drawback of prior stage cumulative indirect taxes or import charges levied on goods that are physically incorporated, making normal allowances for waste (but not taxes or import charges on services, catalysts, and other items not so incorporated), in the exported product shall not confer a countervailable benefit.

(ii) Notwithstanding paragraph (d)(4)(i), in the case of a program purporting to rebate prior stage cumulative indirect taxes and/or import charges, or in the case of a program providing for a fixed rate of duty drawback, the entire amount of the rebate or drawback shall confer a countervailable benefit, unless the Secretary determines that:

(A) The program operates for the purpose of rebating prior stage cumulative indirect taxes and/or import charges;

(B) The government accurately ascertained the level of the rebate or fixed duty drawback; and

(C) The government reexamines its schedules periodically.

(j) *Worker assistance.* The provision by a government of financial assistance to workers confers a countervailable benefit to the extent that such assistance relieves a firm of an obligation which it normally would incur.

(k) *Forgiveness of debt.* The assumption or forgiveness by a government of an outstanding debt obligation of a firm confers a countervailable benefit equal to the outstanding principal and accrued unpaid interest at the time of the assumption or forgiveness. Where a government receives shares in a firm in return for eliminating or reducing a firm's debt obligation, the Secretary shall determine the existence of a countervailable benefit in accordance with the provisions of paragraph (e) of this section.

(l) *Research and development assistance.* Notwithstanding any other provision of this section, assistance provided by a government to a firm in order to finance research and development does not confer a countervailable benefit where the Secretary determines that the results of such research and development have been, or will be, made available to the public, including competitors of the firm in the United States.

(m) *General export promotion.* Notwithstanding any other provision of this section, export promotion activities of a government shall not confer a countervailable benefit where the Secretary determines that such activities consist of general informational activities which do not promote particular products over others.

(n) *Programs with varying levels of benefits.* Notwithstanding any other provision of this section, where a government program provides varying levels of benefits with different eligibility criteria, and one or more of such levels is not selective within the meaning of § 355.43, a countervailable benefit exists to the extent that a firm receives benefits under the program which are more favorable than the most favorable, nonselective level of benefits available under the program. The preceding sentence shall apply only to the extent the Secretary determines that the firm would have been eligible for the nonselective benefits under the program.

(o)(1) *Transnational benefits.* Notwithstanding any other provision of this section, a countervailable benefit does not exist to the extent the Secretary determines that funding for a benefit is provided by a government other than the government of the country in which the merchandise is produced or from which the merchandise is exported, or by an international lending or development institution.

(2) Notwithstanding paragraph (o)(1) of this section, if the members (or other participating entities) of an international consortium that is engaged in the production of a class or kind of merchandise subject to a countervailing duty proceeding receive countervailable subsidies from their respective home countries to assist, permit, or otherwise enable their participation in that

consortium through production or manufacturing operations in their respective home countries, then the Secretary will cumulate all such benefits, as well as benefits provided directly to the international consortium, in determining any countervailing duty upon such merchandise.

§ 355.45 Upstream Subsidies.

(a) *In general.* The term upstream subsidy means any domestic countervailable subsidy provided by the government of a country that:

(1) Is paid or bestowed by that government with respect to an input product which is used in the production in that country of the merchandise;

(2) In the judgment of the Secretary bestows a competitive benefit on the merchandise; and

(3) Has a significant effect on the cost of producing the merchandise.

For purposes of this paragraph, an association of two or more foreign countries, political subdivisions, dependent territories, or possessions of foreign countries organized into a customs union outside the United States shall be treated as being one country if the subsidy is provided by the customs union.

(b) *Threshold determination.* Before investigating the existence of an upstream subsidy, the Secretary must have a reasonable basis to believe or suspect that all of the following elements exist:

(1) A domestic countervailable subsidy is provided with respect to an input product;

(2) One of the following conditions exists:

(i) The supplier of the input product controls the producer of the merchandise, the producer controls the supplier, or the supplier and the producer are both controlled by a third person;

(ii) The price for the input product is lower than the price that the producer otherwise would pay for the input product in obtaining it from an unsubsidized seller in an arm's length transaction; or

(iii) The government sets the price of the input product so as to guarantee that the benefit provided with respect to the input product is passed through to producers of the merchandise; and

(3) The *ad valorem* subsidy rate on the input product multiplied by the proportion of the total production costs of the merchandise accounted for by the input product is equal to, or greater than, one percent.

For purposes of paragraph (b)(2)(i) of this section, the Secretary will not consider common government ownership to constitute control.

(c) *Input product.* For purposes of this section, the term "input product" means any product used in the production of the merchandise.

(d) *Competitive benefit.* In evaluating whether a competitive benefit exists pursuant to paragraph (a)(2) of this section, the Secretary will determine whether the price for the input product is lower than:

(1) The price which the producer of the merchandise otherwise would pay for the input product, produced in the same country, in obtaining it from another unsubsidized seller in an arm's length transaction; or

(2) A world market price for the input product.

For purposes of paragraph (d)(1) of this section, where the Secretary has determined in a previous proceeding that a domestic countervailable subsidy is paid or bestowed on the input product which is used for comparison, the Secretary may, where appropriate, adjust the price which the producer of the merchandise otherwise would pay for the input product to reflect the effects of the subsidy.

(e) *Significant effect.* For purposes of evaluating whether a significant effect exists pursuant to paragraph (a)(3) of this section, the Secretary will multiply the *ad valorem* subsidy rate on the input product by the proportion of the total production costs of the merchandise accounted for by the input product. If the input subsidy so allocated to the merchandise exceeds five percent, the Secretary will presume the existence of a significant effect. If the input subsidy so allocated to the merchandise is less than one percent, the Secretary will presume the absence of a significant effect. If the input subsidy so allocated to the merchandise is between one and five percent, there shall be no presumption. A party may rebut these presumptions by presenting information which demonstrates that subsidies on the input products will have a significant effect on the competitiveness of the merchandise. In assessing such information, the Secretary will consider the extent to which factors other than price, such as quality differences, are important determinants of demand for the merchandise.

(f) *Inclusion of upstream subsidy.* If the Secretary determines that an upstream subsidy is being or has been paid or bestowed, the Secretary will include in the amount of any countervailing duty imposed on the merchandise an amount equal to the amount of the competitive benefit determined pursuant to paragraph (d) of this section; except that in no event shall the amount so included be greater than the amount of subsidization determined with respect to the input product.

(g) *Processed agricultural products.* Notwithstanding any other provision of this section, the Secretary will deem domestic countervailable subsidies found to be provided to either producers or processors of a raw agricultural product to be provided to the manufacture, production, or exportation of the processed agricultural product where the Secretary determines that:

(1) The demand for the prior-stage product is substantially dependent on the demand for the latter-stage product, and

(2) The processing operation adds only limited value to the raw commodity.

§ 355.46 Offsets.

(a) *General rule.* In calculating a countervailable benefit, the Secretary may subtract from the gross benefit, the amount of:

(1) Any application fee, deposit, or similar payment paid in order to qualify for, or to receive, the benefit;

(2) Any loss in the value of the benefit resulting from its deferred receipt, if the deferral is mandated by government order; and

(3) Export taxes, duties, or other charges levied on the export of the merchandise to the United States specifically intended to offset the benefit received.

(b) *Tax effects of countervailable benefits.* In calculating the amount of a countervailable benefit, the Secretary will ignore the secondary tax consequences of the benefit.

§ 355.47 Allocation of countervailable benefits to a product or market and calculation of ad valorem subsidy.

(a) *Benefits tied to a particular product.* Where the Secretary determines that a countervailable benefit is tied to the production or sale of a particular product or products, the Secretary will allocate the benefit solely to that product or products. If the Secretary determines that a countervailable benefit is tied to a product other than the merchandise, the Secretary will not find a countervailable subsidy on the merchandise. If the product or products to which the benefit is tied include the merchandise, the Secretary will calculate the *ad valorem* subsidy rate as follows:

(1) In the case of a domestic program, the Secretary will divide the benefit by a

firm's total sales of the product or products to which the benefit is tied; or

(2) In the case of an export program, the Secretary will divide the benefit by a firm's total exports of the product or products to which the benefit is tied.

(b) *Benefits tied to sales to a particular market.* Where the Secretary determines that a countervailable benefit is tied to the sale of products to a market other than the United States, the Secretary will not find a countervailable subsidy on the merchandise. Where a benefit is tied, or can be tied, to exports to the United States, the Secretary will calculate the *ad valorem* subsidy rate by dividing the benefit by:

(1) The firm's total exports to the United States; or

(2) If the benefit also is tied to exports of a particular product or products, by the firm's total exports to the United States of the product or products to which the benefit is tied.

(c)(1) *Untied benefits.* Where the Secretary determines that a countervailable benefit is not tied to the production or sale of a particular product or products, or is not tied to the sale of products to a particular market, the Secretary will allocate the benefit to all products produced by a firm, in the case of a domestic program, or to all products exported by a firm, in the case of an export program. The Secretary will calculate the *ad valorem* subsidy rate as follows:

(i) In the case of a domestic program, the Secretary will divide the benefit by a firm's total sales; or

(ii) In the case of an export program, the Secretary will divide the benefit by a firm's total exports.

(2) For purposes of paragraph (c)(1) of this section, the Secretary will treat equity infusions as untied benefits.

§ 355.48 Timing of receipt of countervailable benefits.

(a) *General rule.* Ordinarily, the Secretary will deem a countervailable benefit to be received at the time that there is a cash flow effect on the firm receiving the benefit. The cash flow and economic effect of a benefit normally occurs when a firm experiences a difference in cash flows, either in the payments it receives or the outlays it makes, as a result of its receipt of the benefit.

(b) *Particular types of benefits.* For purposes of paragraph (a) of this section, the Secretary ordinarily will deem the cash flow effect to occur as follows:

(1) In the case of a grant or equity infusion, at the time a firm receives the grant or equity infusion;

(2) In the case of the provision of a good or service, at the time a firm pays, or in the absence of payment would have paid, for the good or service;

(3) In the case of a loan, at the time a firm is due to make a payment on the loan;

(4) In the case of a direct tax benefit (other than a tax certificate described in paragraph (b)(5) of this section), at the time a firm can calculate the amount of the benefit, which normally will be the time at which the firm files its tax return;

(5) In the case of a tax certificate used to pay direct taxes, indirect taxes, or import charges, at the time a firm receives the certificate;

(6) In the case of an exemption of an indirect tax or import charge, at the time a firm otherwise would be required to pay the indirect tax or import charge; and

(7) Notwithstanding any other provision of paragraph (b) of this section, in the case of an export benefit provided as a percentage of the value of the exported merchandise (such as a cash payment or an overrebate of indirect taxes), on the date of export.

(c) *Exception.* In unusual circumstances, the Secretary may deem a benefit to be received at a time other than a time prescribed by paragraphs (a) and (b). Where the Secretary departs from the methodology set forth in paragraphs (a) and (b), the Secretary will explain the reasons therefor.

§ 355.49 Allocation of countervailable benefits over time.

(a)(1) *General rule.* In valuing a countervailable benefit, depending upon the nature of the benefit in question, the Secretary will either expense the entire amount of the benefit in a single year, allocate the benefit over two or more years, or calculate an annual benefit for two or more years.

(2) The Secretary will expense recurring countervailable benefits in the year of receipt.

(3) The Secretary will allocate the following nonrecurring countervailable benefits over two or more years:

(i) Grants and equity infusions found to confer a countervailable benefit pursuant to § 355.44(e)(1)(i) where the total amount of grants or equity infusions received under a particular program during a year is:

(A) In the case of grants or equity infusions provided pursuant to a domestic program, equal to or greater than 0.50 percent of all sales of the firm in question during the same year; or

(B) In the case of grants provided pursuant to an export program, equal to or greater than 0.50 percent of the export sales of the firm in question during the same year; and

(ii) Long-term loans where the interest rates on both the government loan and the benchmark loan are long-term fixed rates.

(4) The Secretary will calculate annual benefits for long-term loans and equity infusions other than those types of loans and equity infusions referred to in paragraph (a)(3) of this section.

(b)(1) *Process for allocating grants and certain equity infusions over time.* In allocating over time the benefit from a nonrecurring grant or an equity infusion described in § 355.44(e)(1)(i), the Secretary will use the following three-step process:

(i) Determine the amount of the countervailable benefit pursuant to § 355.44;

(ii) Assign a discount rate; and

(iii) Construct a benefit stream.

(2) For purposes of paragraph (b)(1)(ii) of this section, the Secretary will use as a discount rate the following, in order of preference:

(i) The cost of long-term, fixed-rate debt of the firm in question, excluding loans found to confer a countervailable subsidy;

(ii) The average cost of long-term, fixed-rate debt in the country in question; or

(iii) A rate which the Secretary considers to be most appropriate.

The Secretary will select a discount rate based upon data for the year in which the government and the firm agreed on the terms for receiving the grant or equity infusion.

(3) For purposes of paragraph (b)(1)(iii) of this section, the Secretary will use the following formula in determining the benefit stream:

$$A_k = \frac{y/n + [y - (y/n)(k-1)]d}{1+d}$$

Where

A_k = the amount countervailed in year k,
y = the face value of the grant,
n = the average useful life of a firm's renewable physical assets (equipment), as set forth in the U.S. Internal Revenue Service's 1977 Class Life Asset Depreciation Range System (Rev. Proc. 77–10, 1977–1, C.B. 548 (RR–38),
d = the discount rate, and
k = the year of allocation, where the year of receipt = 1 and $1 < k \leq n$.

(c)(1) *Process for allocating certain long-term loans over time.* In allocating over time the benefit from a long-term loan described in paragraph (a)(3)(ii) of

this section, the Secretary will use the following three-step process:

(i) Determine the grant equivalent for the loan by calculating the present value, in the year the loan is received, of the difference between the amount that the firm is to pay under the government loan and the amount that the firm would have paid under the benchmark loan;

(ii) Assign a discount rate; and

(iii) Construct a benefit stream.

(2) For purposes of paragraph (c)(1)(i) of this section, the Secretary will use the following formula in calculating the grant equivalent of the loan:

$$\sum_{n=0}^{k} \frac{X_n}{(1+d)^n}$$

Where

n = year in the life of the loan,
d = the discount rate,
x = difference between amount paid under government loan and benchmark loan, and
k = the last year in the life of the loan and $k>n>0$.

In no event, however, will the grant equivalent calculated under this paragraph exceed the face value of the loan principal.

(3) For purposes of paragraph (c)(1)(ii) of this section, the Secretary will use as a discount rate the benchmark interest rate for the loan in question determined pursuant to § 355.44(b).

(4) For purposes of paragraph (c)(1)(iii) of this section, the Secretary will use the following formula in determining the benefit stream:

$$A_k = y/n + [y - (y/n)(k-2)]d$$

Where

A_k = the amount countervailed in year k,
y = the grant equivalent,
n = the number of years in the life of the loan,
d = the discount rate, and
k = the year of allocation, where the year of receipt = 1 and $2 \leq k \leq n+1$.

(d)(1) *Process for calculating annual benefit attributable to other long-term loans.* In the case of long-term loans other than loans described in paragraph (a)(3)(ii) of this section, for each year the loan is outstanding the Secretary will determine the amount of the benefit attributable to a particular year by calculating the difference between what the firm paid during the year under the government loan and what the firm would have paid during the year under the benchmark loan ("loan differential").

(2) In determining the number of years in which a long-term loan potentially confers a countervailable benefit under paragraph (d)(1) of this section, the Secretary will use the number of years in the loan.

(3) In no event may the amount calculated under paragraph (d)(1) of this section exceed the amount the Secretary would have calculated if the Secretary had treated the loan principal as a grant and calculated the annual benefit pursuant to paragraph (b) of this section.

(e)(1) *Equity infusions.* Where a firm receives an equity infusion and the Secretary finds the firm to be unequityworthy at the time of the infusion pursuant to § 355.44(e)(1)(ii), the Secretary will determine the amount of the countervailable benefit, if any, conferred in a year by multiplying the difference between the firm's rate of return on equity and the national average rate of return on equity for firms in the country in question ("rate of return shortfall") by the total amount of the equity infusion. The Secretary will use the rates of return for the year in question. If the firm paid dividends to the government during the year, the Secretary will subtract the amount of such dividends from any countervailable benefit found, provided that such dividends are not included in the firm's rate of return.

(2) In determining the number of years in which an equity infusion potentially confers a countervailable benefit under paragraph (e)(1) of this section, the Secretary will use the average useful life of a firm's renewable physical assets (equipment), as set forth in the U.S. Internal Revenue Service's 1977 Class Life Asset Depreciation Range System (Rev. Proc. 77–10, 1977–1, C.B. 548 (RR–38)).

(3) In no event may the amount calculated under paragraph (e)(1) of this section exceed the amount that the Secretary would have calculated if the Secretary had treated the amount of the equity infusion as a grant and calculated the annual benefit pursuant to paragraph (b) of this section.

(f) *Contingent liability interest-free loans.* Where a government provides a long-term, interest-free loan, the obligation for repayment of which is contingent upon subsequent events, the Secretary will treat any balance on the loan outstanding during a year as an interest-free, short-term loan, will determine the amount of the countervailable benefit for the review period in accordance with the provisions of § 355.44(b)(3), and will expense such benefit to the year in question.

(g) *Forgiven loans.* Where during a year a government forgives all or part of a loan, the Secretary will treat the forgiven amount as a grant and will expense or allocate it in accordance with the provisions of this section.

(h) *Other benefits.* In the case of benefits not covered by any other provision of this section, the Secretary will value the benefit in accordance with the underlying principles of this section.

§ 355.50 Program-wide changes.

(a) *In general.* Where

(1) The Secretary determines that subsequent to a review period, but before a preliminary determination described in § 355.15 or a preliminary results of review described in § 355.22, a program-wide change has occurred, and

(2) The Secretary is able to measure the change in the amount of countervailable subsidies provided under the program in question,

the Secretary may take such program-wide change into account in establishing the estimated countervailing duty cash deposit rate.

(b) *Definition of program-wide change.* For purposes of this section, the term "program-wide change" means a change:

(1) Not limited to an individual firm or firms; and

(2) Effectuated by an official act, such as the enactment of a statute, regulation, or decree, or contained in the schedule of an existing statute, regulation, or decree.

(c) *Effect limited to cash deposit rate.* The application of paragraph (a) shall not result in changing an affirmative determination to a negative determination or a negative determination to an affirmative determination.

(d) *Terminated programs.* Where a program-wide change consists of the termination of a program and:

(1) The Secretary determines that residual benefits may continue to be bestowed under the terminated program; or

(2) The Secretary determines that a substitute program for the terminated program has been introduced and the Secretary is not able to measure the amount of countervailable subsidies provided under the substitute program, the Secretary will not adjust the cash deposit rate pursuant to paragraph (a).

§ 355.51 Calculation of country-wide rate.

For purposes of §§ 355.20(d) and 355.22(d), the Secretary will calculate the weighted-average net subsidy rate attributable to a particular program on a country-wide basis by:

(a) Calculating the *ad valorem* benefit for each firm receiving benefits under the program, and

(b) Weight-averaging the resulting benefits on the basis of the proportion of exports of the merchandise to the United States accounted for by each firm receiving benefits. For purposes of paragraph (b) of this section, the Secretary will exclude exports of firms with zero or *de minimis* aggregate benefits.

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federal register

Wednesday
May 31, 1989

Part III

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 740

Federal Land Program; Surface Coal Mining and Reclamation Operations; Proposed Rule

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 740

RIN 1029—AA76

Federal Lands Program; Surface Coal Mining and Reclamation Operations

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE) of the U.S. Department of the Interior (DOI) proposes to amend portions of the Federal lands regulations to conform to the July 6, 1984, decision of the U.S. District Court for the District of Columbia and to make certain administrative changes. The proposed rule would amend the applicability of the Federal lands program in a manner consistent with the District Court decision.

DATES:

Written comments: OSMRE will accept written comments on the proposed rule until 5 p.m. Eastern time on July 31, 1989.

Public hearings: Upon request, OSMRE will hold public hearings on the proposed rule in Washington, DC, at 9:30 a.m. local time on July 24, 1989 and in Denver, Colorado, at 9:30 a.m. local time on July 26, 1989. OSMRE will accept requests for public hearings until 4:00 p.m. Eastern time on July 5, 1989.

ADDRESSES:

Written comments: Hand-deliver to the Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 5131, 1100 L Street NW., Washington, DC; or mail to the Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 5131–L, 1951 Constitution Avenue NW., Washington, DC 20240.

Public hearings: Department of the Interior Auditorium, 18th and C Streets, NW., Washington, DC; and Brooks Towers, 2nd Floor Conference Room, 1020 15th Street, Denver, Colorado.

Requests for public hearings: Submit requests orally or in writing to the person and address specified under **"FOR FURTHER INFORMATION CONTACT."**

FOR FURTHER INFORMATION CONTACT: Dr. Fred Block, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue NW., Washington, DC 20240. Telephone: 202–343–1864 (commercial or FTS).

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures

Written Comments

Written comments submitted on the proposed rule should be specific, should be confined to issues pertinent to the proposed rule, and should explain the reason for any recommended change. Where practicable, commenters should submit three copies of their comments (see **"ADDRESSES"**). Comments received after the close of the comment period (see **"DATES"**) or delivered to addresses other than those listed above, may not be considered or included in the Administrative Record for the final rule.

Public Hearings

OSMRE will hold public hearings on the proposed rule on request only. The times, dates, and addresses scheduled for the hearings are specified previously in this notice (see **"DATES"** and **"ADDRESSES"**).

Any person interested in participating at a hearing at a particular location should inform Dr. Block (see **"FOR FURTHER INFORMATION CONTACT"**), either orally or in writing, of the desired hearing location by 4:00 p.m. eastern daylight time on July 5, 1989. If no one has contacted Dr. Block to express an interest in testifying in a hearing at a given location by that date, the hearing will not be held. If only one person expresses an interest, a public meeting rather than a hearing may be held, and the results will be included in the Administrative Record. If a hearing is held, it will continue until all persons in attendance wishing to testify have been heard. To assist the transcriber and ensure an accurate record, OSMRE requests that persons who testify at a hearing give the transcriber a written copy of their testimony.

II. Background

Section 523(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) requires the Secretary to promulgate and implement a Federal lands program applicable to all surface coal mining and reclamation operations taking place pursuant to any Federal law on Federal lands. Under section 523(c) of SMCRA, a State with an approved State program may enter into a cooperative agreement with the Secretary of the Interior (hereinafter referred to as the Secretary) to provide for State regulation of surface coal mining and reclamation operations on Federal lands within the State. Section 523(c) provides, however, that the Secretary may not delegate to the State his responsibilities (1) to approve mining plans on Federal lands under the Mineral Leasing Act, as amended, (2) to designate Federal lands as unsuitable for surface coal mining pursuant to section 522 of SMCRA, or (3) to regulate other activities taking place on Federal lands.

On March 13, 1979, the Secretary promulgated the Federal lands program, 30 CFR Chapter VII, Subchapter D (44 FR 15332–15341). That program was amended on February 16, 1983 (48 FR 6912–6941). A notice correcting certain editorial errors and omissions in the February 16, 1983, rule was published on April 1, 1983 (48 FR 13984).

The February 16, 1983, rule was designed to allow States to assume greater responsibility for administering the requirements of SMCRA on Federal lands. That rule established provisions limiting the applicability of the Federal lands program to exclude lands containing unleased Federal coal beneath privately owned surface.

The February 16, 1983, rule was challenged in Round I of *In re: Permanent Surface Mining Regulation Litigation (II)*, Civil Action No. 79–1144 (D.D.C. 1984). The court ruled on the challenge on July 6, 1984, and in an amended order on August 30, 1984.

Among other things, the court ruled, with respect to the applicability of the Federal lands program, that the February 16, 1983, regulations inappropriately limited the applicability of the Federal lands program by excluding lands containing unleased Federal coal beneath State or private surface. Therefore, OSMRE is proposing to revise its rule to implement the District Court's 1984 order. Since the Court decision, OSMRE has been acting in accordance with the ruling.

In addition, OSMRE is proposing certain other changes for clarity and consistency with existing requirements concerning responsibilities of the Bureau of Land Management (BLM).

III. Discussion of Proposed Rule

30 CFR Part 740

In 30 CFR Part 740, references to BLM regulations at 43 CFR Parts 3480–3487 would be changed to 43 CFR Group 3400 to conform with BLM terminology.

Section 740.4 Responsibilities

Section 740.4(d) lists the responsibilities of BLM. OSMRE is proposing to revise this section to reflect more accurately applicable BLM requirements. Section 740.4(d) (2) and (3)

refer to inspection, enforcement and civil penalties with respect to exploration licenses and exploration operations subject to applicable BLM regulations. However, the BLM regulations do not provide for civil penalties with respect to exploration activities. This proposed rule would delete references to civil penalties under BLM rules cited in § 740.4(d).

Proposed paragraph 740.4(d)(2), which would replace existing paragraphs 740.4 (d)(2) and (d)(3), would state that BLM would be responsible for inspection and enforcement of the terms and conditions of coal exploration licenses and exploration operations issued and approved pursuant to 43 CFR Group 3400. Existing paragraph (d)(3) would be removed. Existing paragraph (d)(4) would be renumbered as new paragraph (d)(3).

Existing paragraph 740.4(d)(5), which concerns inspection and enforcement with respect to the recovery and protection of the coal resource, would be replaced by proposed paragraph (d)(4) and revised to refer only to terms and conditions of recovery and protection of the coal resource. This proposed revision would delete reference to civil penalties for the same reason as discussed under proposed paragraph (d)(2).

Existing paragraphs at 30 CFR 740.4(d)(6), (7), (8) and (9) would be renumbered as paragraphs (d)(5), (6), (7) and (8).

Section 740.11 Applicability

Section 740.11 of the existing regulations sets forth the applicability of the Federal lands program. Existing paragraphs (a)(2) and (3) limit the applicability of the Federal lands program to surface coal mining and reclamation operations on lands containing leased Federal coal and on lands where either the coal to be mined or the surface is owned by the United States. The District Court in *re: Permanent Surface Mining Regulation Litigation (II)*, Civil Action No. 79–1144 (D.D.C. 1984), ruled that the general exclusion from the Federal lands program of surface coal mining operations on private or state owned surface overlying unleased Federal coal was inconsistent with SMCRA. Therefore, OSMRE proposes to modify the Applicability section of the Federal lands program by revising paragraph (a)(2) and removing paragraph (a)(3), to provide that upon approval or promulgation of a regulatory program for a State, that program and 30 CFR Subchapter D shall apply to surface coal mining and reclamation operations taking place on any Federal lands; that is, any lands containing Federal surface or Federal coal or both. This means that where surface coal mining operations occur on lands where the surface, the minerals, or both, are federally owned, the Federal lands program will apply.

IV. Procedural Matters

Federal Paperwork Reduction Act

This proposed rule does not contain information collection requirements which require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

Executive Order 12291 and Regulatory Flexibility Act

The DOI has determined that this document is not a major rule under the criteria of Executive Order 12291 (February 17, 1981) and certifies that it would not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* The rule does not distinguish between small and large entities. These determinations are based on the findings that the regulatory additions in the rule would not change costs to industry or to the Federal, State, or local governments. Furthermore, the rule produces no adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States enterprises to compete with foreign-based enterprises in domestic or export markets.

National Environmental Policy Act

The proposed rule is part of the Federal lands program, the promulgation of which is exempt under section 702(d) of SMCRA (30 U.S.C. 1292(d)), from compliance with section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)).

Author

The principal author of this proposed rule is Dr. Fred Block, Branch of Federal and Indian Programs, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue NW., Washington, DC 20240; Telephone: 202–343–1864 (Commercial or FTS).

List of Subjects in 30 CFR Part 740

Coal mining, Public lands, Mineral resources, Reporting and recordkeeping requirements, Surface mining, Underground mining.

Accordingly, it is proposed to amend 30 CFR Part 740 as follows:

Date: April 27, 1989.

Michael A. Poling,

Deputy Assistant Secretary, Land and Minerals Management.

PART 740—GENERAL REQUIREMENTS FOR SURFACE COAL MINING AND RECLAMATION OPERATIONS ON FEDERAL LANDS

1. The authority citation for Part 740 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.* and 30 U.S.C. 181 *et seq.*

2. In 30 CFR Part 740, remove "43 CFR Parts 3480–3487" and replace it with "43 CFR Group 3400."

3. In 30 CFR 740.4, paragraph (d)(2) is revised, paragraph (d)(3) is removed, paragraph (d)(4) is redesignated as paragraph (d)(3), paragraph (d)(5) is revised and redesignated as paragraph (d)(4), and paragraphs (d) (6), (7), (8) and (9) are redesignated as paragraphs (d) (5), (6), (7), and (8), to read as follows:

§ 740.4 Responsibilities.

* * * * *

(d) The Bureau of Land Management (BLM) is responsible for:

* * * * *

(2) Inspection and enforcement of the terms and conditions of coal exploration licenses and operations issued and approved pursuant to 43 CFR Group 3400;

* * * * *

(4) Inspection and enforcement with respect to the terms and conditions of recovery and protection of the coal resource as required by 43 CFR Group 4300;

* * * * *

4. In § 740.11, paragraph (a)(2) is revised and paragraph (a)(3) is removed to read as follows:

§ 740.11 Applicability.

(a) * * *

(2) Surface coal mining and reclamation operations taking place on any Federal lands.

* * * * *

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